MAINTAINING TOXIC TORT CLAIMS AGAINST THE FEDERAL GOVERNMENT: A CASE STUDY OF LIABILITY THEORIES, DEFENSES AND REMEDIES

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I. INTRODUCTION

This paper assesses the viability of toxic tort claims under the Federal Tort Claims Act (the FTCA or the Act). The scenario provided is offered as a fictitious history of one factual setting in which such claims may arise. Though the scenario suggests that both private and non-federal governmental entities contributed to the situation, the paper is confined to the FTCA. Only theories of liability, defenses and remedies are considered.

The FTCA was enacted in 1946 to compensate people injured by tortious acts of government employees.[1] It applies state law respondeat superior principles. To be cognizable, an injury must result from conduct of federal employees acting within the scope of employment or office.

With certain exceptions,[2] the Act waives sovereign immunity for negligent or wrongful conduct and allows recovery of money damages for personal injury, death and property damage. The law applied is that of the place where the injury occurs: the United States is liable to the same extent as a private person.[3]

Except for bona fide counterclaims, cross claims, or third party actions,[4] all claimants must file written claims with the appropriate agency before filing suit.[5] Claims must be filed within two years of when they arise.[6] Claimants may not sue until either the agency denies the claim in writing or six months elapse from the date of receipt.[7] If the agency fails to deny within that period, claimants may treat lack of decision as a constructive denial and file suit.[8] After written denial, claimants have six months to file suit.[9]

All claims must be submitted in writing.[10] They must be signed by the claimant[11]--or an authorized representative if evidence of representative capacity is submitted[12]--and must demand a sum certain in damages.[13] Failure to file an administrative claim is a jurisdictional defect that can only be remedied by compliance; both the two year claims and six month litigation limitations are also jurisdictional. In the past, filing a state court action against an individual employee without submitting an administrative claim did not toll the limitations period or constitute administrative compliance. The government moved to substitute defendants, removed to federal court, and moved to dismiss for failure to exhaust administrative remedies.[14] A recent amendment provides a time extension to plaintiffs who erroneously file suit against individual employees. They now have 60 days from the date suit is dismissed to file a claim.[15]

FTCA cases are tried to a district court judge without a jury.[16] Claimants may not sue for more money than they claimed administratively. Damages may be increased if they obtain new evidence not reasonably discoverable beforehand. Otherwise, denial--whether actual or by exercise of the claimant's option to file suit after six months--freezes the upper limit of damages.[17]

The first two Supreme Court decisions interpreting the Act, Feres v. United States[18] and Dalehite v. United States,[19] had an overwhelming impact on subsequent decisions, possibly far beyond the intent of their authors, and certainly beyond their facts. The third case, Indian Towing Co. v. United States,[20] correctly

interpreted Feres and implicitly overruled an important portion of Dalehite. Virtually all FTCA decisions cite one or the other of these cases as their foundation.

The Act provides a procedural remedy only. State law furnishes the substance. Consequently, practitioners must thoroughly understand the tort "law of the place" in pursuing or defending FTCA cases. Although elements of a particular cause of action may vary by state, some aspects of the FTCA's application are governed by federal law alone. Analysis of state tort law is beyond this paper's scope. Rather, this paper is intended to provide an overview for pursuing or defending toxic tort claims under the FTCA, with emphasis on the overriding federal concerns. Cases were selected for their importance to an understanding of the Act or because they involve issues or fact patterns relevant to toxic tort claims.

II. SCENARIO

In 1955, Rural, America was a farming community in the foothills of a western mountain range. Its population of 5000 was stable; Rural was too far from any major cities for commuters and the surrounding countryside wasn't attractive to tourists. The major employer and landowner was Hawk Trucking Company which located in Rural because of highway access and inexpensive land. Residents obtained drinking water from wells, drawing from the regional aquifer. A small, usually dry, creek ran from Hawk land through the center of town. Heavy rains flooded the creek so a

concrete spillway was built to control runoff. When flooded, it was quite an attraction to local children.

In the early 1950s, a chemical company built a plant near Rural and town leaders persuaded Hawk to convert a barren property into a waste disposal site. Such a facility would increase trucking revenues, so Hawk agreed even though he had no experience in waste disposal. The site was surveyed by state and local officials. The floor was "impermeable" bedrock. Three sides were formed by canyon walls. The fourth was a concrete dam glued to the canyon walls with an impenetrable, long-lasting superglue. There were no underground springs and the region's aquifer was miles away. After a favorable engineering report, the officials issued a conditional use permit which required monitoring wells and pre-dumping approval of all wastes. Similar liquid wastes were to be placed in separate lagoons. A local newspaper excitedly announced that the Hawk disposal site, located one mile upgradient of Rural, was open for business. Chemical wastes poured in for the next fifteen years.

Fox Field, a nearby military installation, was the first customer. It previously dumped waste into on base dry water wells but they were full and storage areas overrun. It's mission involved aircraft, ordnance and heavy industrial equipment. Support operations included fueling, painting, degreasing, cleaning and maintenance producing wastes contaminated with cadmium, chromium, arsenic, trichloroethylene (TCE) and oil sludge. Base personnel diluted wastes in water because they believed this was easier on the environment. Water for base

operations and its population--5000 military and civilian employees and 10,000 military dependents who resided in base quarters--was supplied by on base wells.

Fox Field contracted with Hawk for waste disposal. The contract included: (1) a hold harmless and indemnity clause providing for termination if the site became a public nuisance or hazard to public health or wildlife; (2) a "Safety Precautions for Dangerous Materials" clause that required Hawk to comply with applicable laws and defined dangerous materials as "acids, fuels, hazardous chemicals, and other toxic and corrosive substances"; and (3) an inspection clause subjecting the site to government inspection and testing.

During pre-award inspection, base officials were instructed to segregate liquid wastes to facilitate placement in the proper lagoon. A condition to that effect was added to the contract. Wastes were picked up by contract haulers selected by Hawk. Although base personnel initially complied, this stopped when haulers said it made no difference: wastes were dumped in the first available lagoon. Base records showed approximate volumes and did not always identify the wastes. There were no post-award inspections.

Unusally heavy rains occurred in the late sixties and early seventies and the dumpsite became so full officials feared the dam would break. They decided to open the floodgates and inundate Rural without notice or evacuation. Afterwards, residents became alarmed. Although pungent odors occasionally emanated from the canyon, this discomfort was accepted as the

price of development. But now, cattle and other animals became sick or died, and people suffered from a variety of nonspecific illness symptoms. Children's sneakers reportedly disintegrated after contact with creek water.

Shortly thereafter, Hawk stopped accepting waste, closed the gates and disavowed responsibility for the site. For several years, government officials argued over legal responsibility for the site until the regional water authority assumed jurisdiction, declared the site a public nuisance, and closed it in 1978.

Rural residents were extremely concerned. More cattle were dead and an alarming number of human and animal offspring had serious birth defects. Longtime residents suffered chronic, unexplained illnesses and many developed cancer; others feared its manifestation. Residents formed an action group and, by media and political pressure, forced government officials to appear at public meetings. Officials claimed the monitoring wells showed no migration but reluctantly revealed that chemicals at the site were potential causes of birth defects, chronic illness, cancer and death. For several years, these officials stated the dumpsite was not the source, though they had no other explanation.

Continued pressure forced the Governor to request help from the United States Environmental Protection Agency (EPA). Its initial investigation showed local wells were contaminated by the same chemicals that were dumped at the site and that the monitoring wells were not properly placed. Properly located wells showed massive migration. Since the situation was under

study, EPA did not disclose this until three years later when it issued notices to Potentially Responsible Parties[21] including Hawk and the military installation. While investigating, EPA discovered Fox Field previously used dry water wells to dispose of the same chemicals it dumped at Hawk. Since Fox was located over a similar geologic formation, EPA drilled test wells around the dry wells to learn about migration patterns. Though no test wells had been previously drilled, base engineers knew the water table had recently risen by several feet. EPA's wells showed extensive migration and that base water supplies were highly contaminated. Shortly thereafter, accompanied by significant media attention, Fox Field was placed on the National Priority List.[22]

EPA and the state later filed suit under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[23] against Hawk, major generators, and transporters to require or recover the cost of cleanup. As a result, Rural residents learned that: Fox Field contributed 10% of the waste by volume but was not a named party; the original engineering assessment was wrong (bedrock isn't impermeable, there were several on-site springs, the superglue leaked, the original monitoring wells were ineffective, the regional aquifer was directly beneath the site). Residents had been exposed to air and waterborne toxic chemicals for the past thirty years. EPA knew this for three years but didn't tell them.

Frustrated with litigation delays and because CERCLA provides no remedies for personal injuries, the group hired a

lawyer who suggested FTCA claims, because two federal agencies were involved. Rural residents filed 5000 claims in January, 1987. Fox Field later received 24,000 additional claims from former and current civilian employees, active duty and retired military personnel and military dependents. Nearby residents filed claiming their wells were contaminated.

The claims were denied and 30,000 complaints were filed. The cases were consolidated into groups: civilian employees, active duty military personnel, retired military personnel, military dependents, Rural residents, and Fox Field neighbors. Codefendant Hawk Trucking Company filed a cross claim against the United States.

The complaints by Rural residents alleged several theories of liability: negligent selection and supervision of Hawk as a contractor, negligent creation of contract specifications, negligent failure to warn, negligent and intentional infliction of emotional distress, negligent creation of a nuisance, trespass, conversion, assault and battery, breach of Good Samaritan duties, and strict liability for ultra-hazardous activities. They sought damages for the expense of alternate water supplies, inconvenience, diminished real estate values and loss of rental income, mental anguish, pain and suffering, medical expenses, medical surveillance, injunctive relief, punitive damages, and attorneys' fees.

Fox Field's neighbors alleged negligent contamination of their water supply, negligent failure to warn, negligent and intentional infliction of emotional distress, negligent creation

of a nuisance, trespass, assault and battery, and strict liability. They sought similar damages. Current and past military and civilian personnel and their dependents made similar allegations for the same relief.

Hawk sought indemnity or contribution for negligence in drafting the contract, failure to inspect and failure to enforce the contract. Hawk claimed the duty of care was non-delegable and that it was immune as a government contractor.

The government asserted that: the residents, neighbors and employees' claims were barred by the statute of limitations; the discretionary function, misrepresentation and intentional torts exceptions applied; it was not liable for negligent independent contractors; it met the applicable standard of care; strict liability, non-delegable duty and nuisance theories were not actionable; current and former military members were barred by judicial exception; and that former and current civilian employees were barred by statutory exclusivity.

The government responded to the cross-claim stating that it had no duty to inspect; was not required by law to require contract compliance; the specifications were not negligently created; that even if they were, such claims were barred by the discretionary function exception; it was not liable for negligent independent contractors; it could not be held liable under non-delegability theories for contractor torts; and the government contractor defense did not apply.

III. JURISDICTIONAL BARS AND SELECTED DEFENSES

There are several imposing statutory[24] and judicial defenses available under the FTCA. They are crucial to the theories of liability that follow and are presented first.

A. The Statute of Limitations

Section 2401(b) requires that all claims be presented to the affected federal agency "within two years after such claim accrues." In some cases, determining when accrual occurs is difficult.

1. The Medical Malpractice Discovery Rule

The most widely quoted case on this issue is United States v. Kubrick.[25] Plaintiff received neomycin treatment in 1968 and later developed a hearing loss. In January 1969, a physician advised it was highly possible (or likely[26]) this drug was the cause. While pursuing a VA claim in 1971, Kubrick was told neomycin caused his injuries. He later filed an FTCA suit.[27] The district court granted judgment for Kubrick[28] and the Third Circuit affirmed.[29] It held that such claims do not accrue until the claimant knows or should suspect the doctor who caused the injury was legally at fault. The Supreme Court reversed, holding that accrual is not dependent on knowledge of law but only on knowledge of the injury and its cause. The Court disapproved contrary language in the dissent and several circuit cases.[30]

Claimants must file within two years of the date when knowledge of injury and its cause coalesces. Knowledge of the tortfeasor's identity,[31] appreciation of legal ramifications and technical complexity are irrelevant.[32] Kubrick's statute started

to run when he was advised it was highly possible or likely neomycin caused his hearing loss. But neither "highly likely" nor "highly possible" equates with actual knowledge. These comments merely prompt suspicion. Although he knew the cause within two years of filing, the Court said Kubrick could have discovered it earlier.[33] **Kubrick** is difficult to reconcile with an earlier, virtually identical case[34] which was cited in both lower court decisions.[35]

2. The Discovery Rule is Non-Medical Malpractice Cases

Urie v. Thompson was the genesis for the discovery rule.[36] This action under the Federal Employer's Liability Act (FELA)[37] involved a plaintiff who developed silicosis from inhaling dust as a fireman on steam locomotives for thirty years. The discovery rule applied. **Urie** is often quoted in FTCA cases.[38,39]

Kubrick implicitly indicated that the discovery rule applied only to medical malpractice cases but the opinion wasn't limited to that effect.[40] Several lower courts cite this decision as a rule of general application.[41] For example, **Stoleson v. United States**[42] was an action for injuries caused by nitroglycerin exposure. Plaintiff worked in an ammunition plant. Near the end of her first year, she experienced chest pains and suffered a severe angina attack in January 1968. She was hospitalized with severe chest pains, returned to work in May 1968 but continued to suffer weekend angina attacks. By the time her employment was terminated, she suffered four or five attacks a weekend.

From the outset, plaintiff suspected nitroglycerine as the cause but was advised to the contrary. One physician even said

the exposure was good for her. In 1969, she saw a newspaper article suggesting that nitroglycerine withdrawal may cause angina. An occupational safety inspector agreed there was a relationship.

In 1971, a cardiac specialist confirmed her suspicions. In August 1972, she submitted a claim and filed suit "after an unsuccessful journey through the administrative process."[43] The district court fourd negligence but dismissed because the statute had run. After a painstaking analysis of Urie and Kubrick,[44] the Seventh Circuit held the discovery rule applied:

> Urie teaches that it is the nature of the problems faced by a plaintiff in discovering his injury and its cause, and not the occupation of the defendant, that governs the applicability of the discovery rule. . . . Rather, any plaintiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule.[45]

Comparing Kubrick with Mrs. Stoleson, the court stated that Kubrick wasn't "blameless for his ignorance and delay" and that he "lacked the presence of mind" to seek competent advice while praising Mrs. Stoleson for her dogged inquiries.[46] Since the medical field didn't recognize a causal connection between angina and nitroglycerin until three years after the initial attack, she could only have possessed knowledge of its cause at that point. Therefore, the statute didn't begin to run until April 1971 and her claim was timely.[47]

Another case interpreting Kubrick as a rule of general application,[48] Liusso v. United States,[49] involved a Ku Klux Klan murder. One of the "Klansmen" was an undercover informant who for many years denied any wrongdoing. Additional facts turned up

and a claim was filed in October 1977. The claim wasn't barred because "plaintiffs had no reason to commence an investigation into government complicity . . . until 1975, when Rowe publicly testified regarding his violent activities as an FBI informer."[50] The court seized on an ambiguity in **Kubrick**:

> . . . it would be both unfair and unrealistic to hold that plaintiffs should have investigated their claim earlier, for they had no cause to do so. This case thus presents an instance in which knowledge of the identity of the tortfeasor is a critical element to the accrual of a claim.[51]

Ordinary tort cases applying the discovery rule include wrongful death claims for: negligent administration of the swine flu vaccine program;[52] use of plaintiff's decedent as a subject for chemical experimentation;[53] negligent failure to close a road that subsequently flooded;[54] negligent failure to detain an illegal alien who later committed murder;[55] an FELA case alleging disabilities with a long latency period;[56] claims involving covert operations[57] and arson;[58] claims that the USDA negligently diagnosed and destroyed cattle;[59] and a claim for contribution.[60]

3. Continuing Torts

The **Urie** court wasn't impressed by the continuing tort theory.[61] The Eleventh Circuit recently agreed.[62] But courts have recognized continuing torts since at least 1948.[63]

In **Kennedy v. United States**,[64] property owners brought an action against the Corps of Engineers (Corps) because its activities caused their shoreline to erode. The court held that "the statute of limitations does not act as a bar to the tort claims asserted,"[65] citing a nearly identical case which held

plaintiffs "had stated a claim for a continuing tort 'for which the cause of action accrues anew each day.'"[66] The Eighth Circuit also stated that continuous wrongful conduct may give rise to a continuing cause of action.[67]

Other decisions distinguish between whether the cause or its effects continue.[68] In **Maslauskas v. United States**,[69] plaintiff alleged illegal incarceration due to continuing negligence by a parole commission. A parole violator warrant initially issued in 1972 was continued by the commission in 1977 and 1979. Plaintiff was released from custody in 1980 and filed a claim in August 1981. The government argued the latest date for accrual was the third commission review in January 1979 and that the statute ran in January 1981. The court agreed because "[t]he fact that plaintiff remained in custody as a result of defendant's alleged negligence does not automatically give rise to a continuing tort. . . . For there to be a continuing tort there must be a continuing duty."[70]

4. Media Notice

One case recognized that press reports and community knowledge may start the limitations clock running:

> The suspension of the program was reported widely in the press, including . . . issues of the Idaho Statesman, a newspaper servicing Sanborn's community. The government argues that because of those press reports, Sanborn should have "reasonably known" of the cause of his wife's death . . .[71]

But the decision acknowledged the difficulties this issue presents.[72] In **O'Brien v. Eli Lilly & Co.**,[73] the Third Circuit agreed that plaintiff knew or should have known who or what

caused her injuries three years earlier than she claimed stating "[t]he facts . . . demonstrate that in 1976 appellant knew the facts necessary to complete her investigation. . . . The district court's conclusion that as a matter of law appellant unreasonably delayed investigating is underscored by the similarity of plaintiff's knowledge in 1976 to her knowledge in 1979."[74] In large part, plaintiff's knowledge came from a magazine article. A similar case, Ballew v. A. H. Robbins Co.[75] involved both newspaper and actual notice, and medical inquiries.

B. The Discretionary Function Exception

This is part of a two-fold exemption for acts and omissions of federal employees who use due care while executing a statute or regulation, or perform or fail to perform discretionary acts. The meaning of the exception[76] is the single most misunderstood provision of the FTCA. Until recently, one Supreme Court decision was responsible.

1. Dalehite v. United States[77] is widely cited for establishing the planning--operational test. Unfortunately, the opinion is poorly written and reasoned because the author relied on a loosely worded portion of the legislative history, seemed obsessed with preserving governmental immunity, and misapplied the Act's liability standard.[78] Four principles of varying longevity resulted: Section 2680(a) protected planning but not operational activities; governmental functions were immune from liability; discretion applied to all acts of execution; and strict liability theories did not apply.

The case arose from a foreign aid program to ship fertilizer (FGAN) to occupied countries. A key ingredient, ammonium nitrate, was used in explosives. Two ships loaded with FGAN caught fire and exploded. The port city was levelled, 560 people were killed and almost a thousand were injured. This was the test case for almost three hundred lawsuits.[79] Plaintiffs[80] won at trial but the Fifth Circuit reversed.[81] In a 4-3 plurality decision, the Supreme Court affirmed.

The plurality opinion was written by Justice Reed,[82] who relied on a part of the legislative history that reversed and interchanged the statutory positions of the two clauses.[83] Justice Reed read this language along with other specific exclusions[84] to mean that "Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions."[85] This statement was too broad,[86] the underlying analysis incorrect,[87] and the opinion poorly constructed.[88] The first clause doesn't exclude claims for negligent execution of a statute or regulation.[89] All negligence actions involving governmental activities were not barred.

The opinion repeatedly referred to the governmental function exception.[90] Section 2680(a) doesn't use the word governmental.[91] It refers to discretionary acts. To invoke FTCA jurisdiction, the negligent conduct must be governmental. If governmental activity is excluded, then the FTCA doesn't waive sovereign immunity.

Justice Reed intended this incongruous result.[92] He did not define[93] "governmental function."[94] He did say that traffic

accidents[95] were not excluded and that governmental functions were activities having no private sector counterpart. Few aspects of this program were peculiarly governmental.[96] It was not a regulatory effort and the fertilizer was privately manufactured.

Justice Reed also applied the private person liability standard[97] incorrectly. He used dicta from Feres v. United States[98] to justify municipal immunity as a defense. The Feres decision did state that: "[The Act's] effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities."[99] But that case involved a far different, very narrow issue bearing no relation to the facts and issues in Dalehite. [100] Nevertheless, this language buttressed Justice Reed's conclusion that governmental functions were excluded. Since municipalities were immune from liability at common law, allowing these actions under the FTCA would create "novel and unprecedented liability."

After he found creation of the program discretionary, Justice Reed ignored how it was executed.[101] Once discretion was exercised, all subsequent activities were immunized.[102] He did not analyze operational activities because he never intended to apply any such test.[103]

This decision established four principles: planning activities were protected while operational ones were not; governmental functions were immune; immunity applied all the way down the chain of command; and strict liability was not

applicable. The second lasted a few months but the first and third took years to erode.[104] Only the fourth remains.

2. Indian Towing Company v. United States[105] was decided only twenty-nine months later and held that the governmental function test no longer applied. Liability was assessed for failing to maintain a lighthouse, even though there were no similar, privately operated facilities.[106] Not surprisingly, Justice Reed dissented.[107] His opinion made it clear he was misunderstood, stating that "[t]he over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of any governmental activity on the 'operational level.'"[108]

One month later, the Court held the government liable for negligent firefighting:

> We expressly decided in Indian Towing that . . . the injured party cannot be deprived of his rights under the Act by resort to an alleged distinction . . . between the Government's negligence . . . in a "proprietary" capacity and its negligence . . . in a "uniquely governmental" capacity. To the extent that there was anything to the contrary in the Dalehite case it was necessarily rejected by Indian Towing.[109]

Though neither decision expressly overruled Dalehite, governmental functions, per se, were no longer protected.

3. United States v. S. A. Empressa De Viacao Aerea Rio Grandense (Varig Airlines)[110] reversed two decisions imposing liability for negligent aircraft inspections.[111] Dalehite's planning--operational test was discarded.[112] This case involved both high and low level decisions. Congress commanded the Federal Aviation Administration (FAA) to promulgate regulations

promoting air safety. It implemented a mechanism for compliance review, giving inspectors broad discretion to rely on manufacturer's inspections and spot-check if they saw fit. This was discretionary.[113] As to execution, the Court noted that inspectors were explicitly empowered to use judgment.[114] But the opinion left one door ajar:

> Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding.[115]

Though perfectly applicable to Varig's facts, this language suggested that all regulatory activity was immune.[116] It took another four years to resolve this issue.[117]

4. Berkovitz v. United States [118] held that regulatory activity was not per se exempt. Citing the same legislative material relied upon by Justice Reed, the Court stated that "the exception was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are discretionary in nature."[119] The comment--that common-law torts of regulatory personnel were subject to liability just like those of non-regulatory ones--was read as illustrating "that Congress intended the . . . exception to apply to the discretionary acts of regulators, rather than to all regulatory acts."[120]

Most importantly, Berkovitz expanded the test announced in Varig.[121] Claims challenging policy formulation were barred.[122] Failure to perform mandatory duties--even if regulatory--were not.[123] Even if promulgation of regulations is immune under

Section 2680(a), implementation may not be, particularly where a course of conduct is mandated but not followed.[124]

The only portion of Dalehite left intact is its assertion that strict liability does not apply. Governmental functions are not per se immune. The planning--operational test has been discarded. Program creation and execution are different concepts. Not every initially discretionary decision extends immunity to all subsequent, implementing actions. Liability as a private person is determined without reference to purely private functional analogs. The FTCA extends governmental liability well beyond mere traffic accidents.

Indian Towing, Varig Airlines and Berkovitz have almost completely supplanted Dalehite. The focus of the discretionary function exception is now correct: (1) was judgment or discretion exercised? (2) if so, was it authorized? (3) if so, was it exercised for a public policy purpose?

C. Claimants

The Act does not state who may file claims. Definition is found by reference to regulations[125] and judicial decisions.[126] The decisions define "claimant" by exclusion. For example, work-related claims by employees for governmental negligence are barred even though the FTCA contains no express exclusion. Injuries to military personnel are excluded by the Feres[127] decision, though injuries occurring off duty and off base may be treated more favorably.[128] Claims by civilian employees are strictly limited to the Federal Employees Compensation Act (FECA).[129]

1. Claims By Military Members--The Feres Doctrine

Three cases were consolidated in this appeal to the Supreme Court. Two involved medical malpractice claims[130] and the other a death from a barracks fire. The appellate courts were split.[131] The Act and its legislative history were silent.[132] Decision either way could be justified.[133] The Court said it must construe the Act to comport with existing statutes, and that Congress intended to eliminate unfairness due to the tortfeasor's governmental identity in situations that were otherwise actionable.[134]

The Court found three justifications for this decision: there was no parallel private liability;[135,136,137] subjecting military members to varying state laws resulted in non-uniform treatment affecting a distinctively federal relationship;[138] and the Veterans' Benefit Act (VBA) was exclusive.[139] Incident to military service claims were barred because:

> [T]he Government is not liable . . . where the injuries arise out of or are in the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law. We do not think that Congress . . . created a new cause of action dependent on local law for service-connected injuries or death due to negligence. We cannot impute to Congress such a radical departure from established law[140] in the absence of express congressional command.[141]

Though willing to imply an exception for military members in 1950, the Court refused to imply one for federal prisoners in 1963,[142] even though at least one of Feres' rationales (preserving discipline) applies in a prison setting as well as in the military.[143] In short, the Court interpreted lack of

congressional expression to mean one thing for federal prisoners, and another for military personnel.

2. The Brooks Case

Eighteen months earlier,[144] the Court held that injuries to off base, furloughed military personnel were not barred. The military plaintiffs[145] were on furlough off base. Plaintiffs won at trial but the Fourth Circuit reversed.[146]

The court of appeals found support in similar statutes for excluding military members and attempted to squarely confront the "service-connected" versus "service-caused" issue. Admitting there was more reason to exclude the latter, the court excluded both.[147] Though intending to cover both service-caused and service-connected injuries, the court's examples illustrated only the former, while the holding barred both.[148] The court said that "[s]o radical a departure from previous policy and thought should certainly have been expressly stated and not left to inference."[149] Judge Dobie rejected the argument[150] that exclusion of combat[151] and foreign activities[152] indicated congressional intent to allow peacetime claims. His analysis was prescient of the inconsistency that could result.[153]

The Supreme Court reversed and remanded, first concluding that the language "any claim" did not mean "any claim but that of servicemen."[154] It applied statutory construction rules,[155] noted the specific exceptions, and stated these "exceptions make it clear that Congress knew what it was about when it used the term 'any claim.' It would be absurd to believe that Congress did not have servicemen in mind in 1946, when this statute was passed.

The overseas and combatant activities exceptions make this plain."[156]

The injuries were not barred because "we are dealing with an accident which had nothing to do with the Brooks' army careers, injuries not caused by their service except in the sense that all human events depend upon what has already transpired."[157] The Court expressed no opinion if a battle commander's poor judgment, an army surgeon's slip of the hand, or a defective jeep would be actionable. The opinion did note that neither the FTCA nor the VBA were exclusive.[158] Ironically, what Judge Dobie feared most--inconsistency--resulted from the Supreme Court's decision. If the injury occurs inches short of but within an installation, it is probably not compensable. Once that line is crossed, it probably is.

3. "Incident to Service"

This key phrase is not statutorily defined,[159] and no decision provides clear definition.[160] One recently noted that "Feres is not limited to cases of negligent orders given or negligent acts committed in the course of actual military duty."[161] Another, in concluding that off duty on base injuries were barred, said recovery would strain the Feres rule because "[u]nless, therefore, the carefully chosen words . . . are to be given the confined and unnatural meaning sought [i.e., that] serviceman must be injured as a result of, or while acting under, immediate and direct military orders, it is quite plain that plaintiffs may not recover."[162] One approach,[163] limiting the

question to whether the injuries "arose in the course of military duty," has been rejected.[164]

a. The Fifth Circuit Approach

This circuit has come close to filling the definitional void.[165] It's test considers duty status, location, and function.[166]

(1) Duty Status ranges from discharge to active duty. After discharge, military members generally have no cause of action for pre-discharge injuries but have the same rights as the general public afterwards.[167] Courts discuss duty status in terms of furlough, pass, off duty for the day, leave and on duty.[168] Though normally claimants are successful, leave, pass or furlough status is no panacea even though the Supreme Court has stated that:

> A soldier who is off duty or on a pass is not engaged in the business of the United States. While on pass or leave, one in military service "is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him.[169]

Injuries that occur while travelling in leave status on "free" military air service are not actionable.[170] Claims on behalf of servicemen who are murdered on leave off base by other military personnel are barred.[171] The Supreme Court stated:

> . . . the Court of Appeals placed great weight on the fact that Private Shearer was off duty and away from the base . . . . But the situs . . . is not nearly as important as whether the suit requires the civilian court to second-guess military decisions . . . and whether the suit might impair essential military discipline . . . .[172,173]

(2) Situs is the next factor. If injury occurs off base in an off duty status,[174] the claim is actionable. If on base, it is more likely incident to service[175] and the court "must proceed to the further inquiry of what function the soldier was performing at the time of injury . . . . [Where] should not be emphasized above all other factors."[176] The Supreme Court has consistently stated that it makes "no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman who sustains service-connected injuries."[177] Yet "where" is a significant factor.

(3) Military Function involves considering whether the individual was directly subject to military control, under orders, or performing a military mission. Parker was on a four day furlough. The accident occurred on base, just after the furlough started while he was driving home. He was not performing a military function. Consequently, his injury wasn't incident to service.

If Parker had been merely driving home from work after attending to personal affairs, the result would have been different because "[a] distinction can be drawn between those cases involving activities arising from life on the military reservation, and those in which presence on the base has little to do with the soldier's military service."[178]

b. Parker, Revisited

Judge Fay did not explain why injuries from activities on base should be barred if they related to "personal affairs . . . shopping, or activities arising from life on the base."[179] Four

years later, the Fifth Circuit noted "no single factor is necessarily dispositive"[180] but that caselaw "demonstrate[s] that the duty status of the servicemember is usually considered the most indicative of the nature of the nexus between him and the government . . . [and] is therefore the most important factor."[181] For medical malpractice cases, inquiry into the member's function "is essentially subsumed into the inquiry as to his duty status at the time he sought treatment since the 'activity' issue is couched as: 'Was his treatment intended to return him to military service?'"[182] This suggests that malpractice resulting from elective surgery would not be barred because, by definition, it would have no bearing on medical qualification for military service. But this is not the case.[183]

c. Addressing the Anomalies

The Ninth Circuit recently addressed these issues in Atkinson v. United States,[184] a case involving injuries from prenatal medical care. The court initially determined that the Shearer case abandoned the first two rationales for the Feres doctrine, a conclusion quite inescapable from a footnote remark that they "are no longer controlling."[185] The court turned to the third consideration, found no impact on military discipline, rejected the per se and but for tests,[186] and focused on the following:

> No command relationship exists between Atkinson and her attending physicians. No military considerations govern the treatment in a non-field hospital of a woman who seeks to have a healthy baby. No military discipline applies to the care a conscientious physician will provide in this situation.[187]

This opinion was later withdrawn in light of **United States v. Johnson**.[188] The court stated that "[s]ignificant for our purposes is the Court's articulation, with apparent approval, of all three rationales associated with **Feres**."[189] The **Johnson** opinion never addressed the **Shearer** footnote, a curious omission since the latter was decided only 23 months earlier.

d. Leave Slips--Form Over Substance?

Judge Fay's factual indicia test provides a workable definition for this judicially--not legislatively--created exemption. Contrary to his opinion (and numerous others), there is no distinction between leave and off duty.[190] Military members are on duty twenty-four hours each day. They are subject to recall at any time, to military orders, discipline, and the Uniform Code of Military Justice wherever they are.[191] The formality of a leave slip makes no substantive difference. Yet that is precisely what one district court would require. It felt that "[t]he key point is that Private Miller was always subject to call for active duty, and that the immediacy of his peculiar and special relationship to his military superiors had not been severed by any such formality as a furlough, leave or pass."[192] Even "terminal" leave[193] status does not operate to make medical malpractice claims actionable.

e. A Rebuttable Solution?

Courts consistently pass the **Feres** issue to Congress[194] even though the Supreme Court--not Congress--created it. Neither has acted. Injuries caused by negligence with no bearing on military functions, missions, orders, discipline, or superior--subordinate

relationships are compensable solely due to time and place of injury. Judge Heaney's dissent in **Miller v. United States**[195] suggested the following analysis:

> It may be reasonable to presume that when a serviceperson is on base or on active duty status, he or she is engaged in an activity incident to service. The military is more than just a career or job; it is a way of life. Every aspect of servicepersons' daily routine is affected by the military--their livelihood, living arrangements, meals, recreation, personal property, travel and medical care. However, any presumption raised by the situs . . . or status must be rebuttable. The Feres Court did not prohibit claims for injuries sustained by service personnel on active duty or on base--it only prohibited claims for injuries sustained "incident to service."[196]

As to military function, Judge Heaney noted that "Miller's military superiors, in giving him permission to work for the independent contractor, temporarily released their control over his activities. . . . [Consequently] the 'immediacy of his peculiar and special relationship to his military superiors' was severed."[197] As to status, he said "[t]he fact that he could have been recalled . . . is not persuasive. [This] would be true whether he was off base, on leave or on furlough--situations where FTCA claims have been allowed. The fact [is he] had not been recalled."[198] As to function, he said:

> The commanding officer's involvement in the project, and his resultant alleged negligence, is remote. It is nonsense to assume that his, and other military officer's authority to conduct . . . day-to-day affairs . . . will be impaired by allowing the decedents' survivors to litigate . . . whether an electric wire on base was properly maintained.[199]

This appears consistent with two circuit court decisions suggesting "that claims involving base residents require close examination of the employee's actions and the employer's interest

in them."[200] One court recently applied Parker to hold that Feres did not apply.[201]

4. Reservists, Guardsmen, Cadets and Evaders

Reservists travelling to weekend duty on military airplanes are barred[202] as are those actually on duty.[203] Claims from "inactive duty training" by members of the National Guard are barred[204] as are those of Academy Cadets;[205] this is true irrespective of whether they are acting on state or federal orders.[206] Even intentional avoidance of an involuntary recall to active duty order doesn't preclude application of Feres.[207]

5. Derivatives and Dependents

The government is liable for direct injuries to dependents.[208] Subjecting dependents to the vicissitudes of varying state laws[209] would apparently make sense to some members of the Court[210] even though a dependent's presence in a particular locale is just as much "incident to service" and "fortuitous."[211] Apparently, this would have been a rational plan for the Feres Court.[212] Derivative claims of dependents based on injuries to the military member are barred[213] but the service member is entitled to make such claims based on a dependent's injury.[214]

6. When Civilians Are At Fault

"[C]ourts have consistently recognized [that] preservation of military discipline is at the heart of the Feres doctrine."[215] Consequently, when a civilian employee is at fault, one would expect the government would pay. Not so. The Feres doctrine even bars cases where civilian employees are at fault.[216] The Eleventh Circuit recently decided otherwise.[217] This case

involved a negligent civilian air traffic controller. In a 5-4 decision, the Supreme Court reversed.[218] Feres controlled.

The dissent said Feres was wrong and, if not overruled,[219] should be limited to cases involving negligent military members.[220] Justice Scalia felt that the underlying rationales were unpersuasive. First, the Court had already decided that the "private person" liability standard (or exclusion for uniquely governmental functions) was overruled by Indian Towing. Second, the lack of uniformity argument was "no longer controlling."[221] Third, he found no support for holding that the VBA was exclusive.[222] Fourth, he found military discipline was not impacted by imposing liability on negligent activities of civilian employees. Justice Scalia questioned why Congress excluded one type of military activity and not the other?[223] He commented that:

> [P]erhaps Congress assumed that since liability . . . is imposed upon the Government, and not upon individual employees, military decisionmaking was unlikely to be affected greatly. Or perhaps - most fascinating of all to contemplate - Congress thought that barring recovery by servicemen might adversely affect military discipline.[224]

The Feres decision has been criticized[225] but remains unchanged over forty years later. As Justice Scalia stated "Feres was wrongly decided and heartily deserves the 'widespread, almost uniform criticism' it has received."[226]

7. <u>When Civilian Employees Are Injured</u>

The FECA[227] provides a comprehensive administrative system to compensate injured civilian employees.[228] It was enacted to provide swift, certain relief and avoid the expense, effort and

delay of litigation.[229] Determinations by the Secretary of Labor (Secretary) are conclusive.[230] There is no judicial review. Nevertheless, there has been litigation regarding the FECA's interplay with the FTCA. A "substantial question" of FECA coverage requires submission to the Secretary[231] before action may proceed under the FTCA. Lack of actual coverage, i.e., no payment, does not guarantee a tort suit is actionable. Accepting FECA benefits precludes resort to the FTCA, even if recovery was possible if the action had been prosecuted solely under the FTCA.[232]

a. Who is Covered

The Act applies to civilians injured in the course of their employment. In Section 8116(c), Congress provided that the Secretary's determinations were final and conclusive for a long list of potential claimants. Spouses and dependents are listed, so consortium and other derivative claims are not separately actionable under the FTCA.[233] If such claims have an independent factual basis, they are.[234] FTCA claims by ROTC students must be referred to the Secretary,[235] and even volunteers may be barred.[236]

b. Coverage Questions

The "substantial question" rule has been applied since at least 1960. It is intended to insure uniformity.[237] In one court's opinion, "[a] substantial question of FECA coverage exists unless it is 'certain that [the Secretary would find no coverage.'"[238]

Lack of coverage may mean that an FTCA action is permissible, but this is not always true. In Griffin v. United

States,[239] claimant received periodic disability payments but wanted a lump sum. Since "back" wasn't included within the definition of "organ,"[240] Griffin wasn't entitled to a lump sum, so he filed under the FTCA. The court concluded "if the personal injury did occur on the job . . . then FECA is the exclusive remedy. That the FECA does not compensate an employee with Griffin's particular injury is a question of scope of coverage, not coverage in and of itself."[241]

But in Wallace v. United States,[242] the court held that an employee who developed GBS[243] after swine flu inoculation was not barred from an FTCA action. This court described the test as "whether under all the circumstances, a causal relationship exists between the employment itself, or the conditions under which it is to be performed, and the resultant injury."[244] Wallace was "not performing any job-related duties when he received his shot, was not required to receive the vaccine as a condition of employment or for any other reason and could have taken the shot elsewhere."[245] The focus is the relationship of the injury to the job, including function and conditions of employment, and where the injury occurred.

(1) Job-Relationship. Since Wallace wasn't required as a condition of employment to take the shot, his injury wasn't employment related. But in DiPippa v. United States,[246] an identical claim presented a substantial question of coverage, requiring referral to the Secretary. In Gill v. United States,[247] plaintiff participated in a similar voluntary inoculation program, was given the wrong vaccine and suffered a severe

reaction; this FTCA claim was barred because the employer provided ..e shot program. In **Somma v. United States**, an employee's claim for failure to diagnose a required chest X-ray was also barred.[248]

The most questionable case[249] involved an employee injured on his way home from work. Plaintiff lost consciousness at work due to prescribed medication. Coworkers knew he was helpless but allowed him to drive home. This injury was sufficiently job-related to require referral, even though the statute of limitations had run.[250]

Other cases use the "dual-capacity" doctrine to determine whether an injury was job-related. In **Schmid v. United States**,[251] plaintiff was injured in a softball game after work on the employer's property. The game was sponsored by the employer and mainly involved federal employees. The Third Circuit discussed the doctrine as follows:

> Under the dual capacity doctrine, an employee injured in the performance of duty may recover from his employer if the employer was not acting as an employer at the time of injury, but rather as a third party outside the scope of the workmen's compensation statute. Specifically,
>
> > An employer may become a third person vulnerable to tort suit . . . if--and only if--he possesses a second persona so completely independent and unrelated to his status as employer that by established standards the law recognizes it as a separate legal person.[252]

The court referred to a case[253] involving a secretary at a Veterans' Administration (VA) hospital. She became ill at work, was admitted to the hospital and diagnosed with an ectopic

pregnancy. VA physicians performed surgery but were negligent. The court held her injuries were not work-related and that an FTCA action could proceed. Normally, if an employer's medical malpractice aggravates an employment related injury, the claims are work-related and barred under the FTCA.[254]

(2) Situs. Courts apply this factor inconsistently. Generally, if the injury occurs on the employer's premises, it is work-related and barred from the FTCA. In **Daniels-Lumley v. United States**,[255] plaintiff slipped and fell on ice on a sidewalk adjacent to the building in which she worked. In **Joyce v. United States**,[256] plaintiff was injured walking to work on a sidewalk 350 feet from the entrance. In **Reep v. United States**,[257] the injury occurred while plaintiff crossed a street on his way to work. In **Avasthi v. United States**,[258] claimant was injured in a fall at his employer's parking lot on his way home from work. And in **Grijalva v. United States**,[259] plaintiff was injured in an automobile accident on the way home from a military reservation where she worked. All of these were barred from FTCA recovery. These courts appear to have applied a per se "premises" rule.

But in **Bailey v. United States**,[260] an employee was injured on her way home from work "more than a block"[261] from the employer's parking lot. The Fifth Circuit rejected the "premises" rule and held that such injuries must be reviewed in light of all the circumstances. The court felt "that the location of the collision in this case was of small import and no substantial question of FECA coverage is raised by the fortuitous circumstance that the street was owned by the federal

government."[262] The decision followed two Tenth Circuit opinions[263] and held claimant could maintain an FTCA claim.

Civilian employee status does not bar all work-related claims. Title VII actions are not barred.[264] Nor are intentional discrimination, harassment, emotional distress, loss of employment or humiliation claims.[265]

8. The Statutory Employer Defense

When the government contracts for services it would ordinarily perform, injuries to contractor employees may be barred by state workers' compensation law. In **Cottrell v. Jones Const. Co.**,[266] Judge Scott framed the issue as "whether Cottrell was injured while doing work that is part of the business, trade, or occupation of the United States. If so, the United States is entitled to the same immunity from suit in tort as enjoyed by employers generally."[267] He reviewed state law on the statutory employer defense and applied Fifth Circuit precedent.[268] Since the contractor was performing duties Congress authorized the government to perform and was merely acting as an instrument in executing that mission, the claim was barred.

9. Discussion

Courts do not explicitly compare the **Feres** and FECA bars, but there are surprising similarities. Both are predicated on the need for uniformity. Both are applied inconsistently. To a great extent, both defer to the agencies involved, i.e., courts are as loathe to second-guess the Secretary of Defense as they are the Secretary of Labor. Both apply a more or less per se rule for injuries on the premises. Both construe "employee

function" very broadly. Both defer to statutory compensation schemes. Both bar derivative claims, though dependents may prosecute independent tort claims. Both bar medical malpractice claims. Yet for third-party claims, they are surprisingly different: such claims are barred under **Feres**[269] but not under the FECA.[270]

D. State Law Governmental Immunities

The FTCA subjects the government to liability using slightly different language: "in the same manner and to the same extent as a private individual under like circumstances;"[271] and "under circumstances where the United States, if a private person, would be liable."[272] As a result, the United States may not assert as a defense any immunities existing under state law for other governmental entities. The Ninth Circuit recently analyzed this issue:

> **Indian Towing** clearly established that under the FTCA the United States could be held liable for the performance of activities private persons do not perform. The court reasoned that any other result would essentially equate the United States's liability . . . to that of a municipal corporation under state law. . . . Such an equation would be erroneous . . . . Thus the fact that state employees are immune . . . under state law does not determine the scope of . . . liability under the FTCA.[273]

Though **Indian Towing** was the genesis for this rule, **Dalehite** was the precipitator. As discussed, Justice Reed construed the Act as not waiving immunity for governmental activity.[274] He interpreted the FTCA, its legislative history, and Section 2680(a) as the "governmental regulatory function exception,"[275] expanded that to include "other administrative action not of a

regulatory nature,"[276] and decided Congress did not contemplate "that the Government should be subject to liability arising from acts of a governmental nature or function."[277] **Indian Towing** imposed liability for negligence in operating a lighthouse even though private persons do not operate them.[278]

The Ninth Circuit addressed the impact of the discretionary function exception on this rule in **Driscoll v. United States.**[279] Plaintiff alleged an engineer was negligent for not installing traffic control devices. The trial court granted the government's motion to dismiss. On appeal, the court stated:

> In any event, the immunities derived from the law of municipal corporations are of limited utility in interpreting the discretionary exemption. It is clear . . . that injuries resulting from operational level decisions do not cease to be actionable simply because under the law of municipal corporations the wrongdoing government is engaged in a governmental, as opposed to a proprietary, function. . . . Moreover, the United States may be liable under the [FTCA] even though such liability is rarely, if ever, imposed on municipal or local governments.[280]

In sum, the United States will be liable under the FTCA even though a municipal corporation would not be under state law. In addition, the United States is subject to liability even if the activity is never performed by private persons but only by the government.

E. <u>The Government Contractor Defense</u>

The Supreme Court recently addressed the extent to which government contractors are immune. At first, this defense applied only to construction projects but recent decisions extend it to design defects in military equipment.[281] Although this defense does not impact actions brought directly against the

United States by injured persons, it may impact their claims against contractors.

Courts routinely cite **Yearsley v. Ross Const. Co.**[282] as the foundation for the construction contracts rule, even though this decision predated the FTCA and did not involve tort claims. **Yearsley** was a suit for damages to real property. The contractor was not liable for damages resulting from performance of a government contract. Plaintiff's remedy was in the Court of Claims for a taking under the Fifth Amendment.

In **Myers v. United States,**[283] plaintiffs sought damages for waste and trespass under the FTCA arising out of a construction operation. On the authority of **Yearsley**, the FTCA action was dismissed because the action sounded in condemnation rather than tort. But in **Dolphin Gardens, Inc. v. United States,**[284] the court held a contractor immune under the FTCA. The contractor dumped dredged spoil near plaintiff's property. Plaintiff's building was damaged by gases emitted from the pile. The court found that site selection was discretionary. Citing **Yearsley** and **Myers**, the court extended the exception's cloak to the contractor because:

> To impose liability on the contractor under such circumstances would render the Government's immunity for the consequences of acts in the performance of a "discretionary function" meaningless, for if the contractor was held liable, contract prices to the Government would be increased to cover the contractor's risk of loss from possible harmful effects of complying with decisions of executive officials authorized to make policy judgments.[285]

In **Boyle v. United Technologies Corp** (UTC),[286] plaintiffs' decedent was killed when he could not escape from a helicopter under water. Plaintiffs alleged the escape system was

defectively designed. The hatch opened out, rather than in, and could not be opened under water due to outside pressure. Because the decedent was on active military duty, action against the United States was barred by **Feres**. Plaintiffs brought suit under state law against the designer and won. The district court[287] denied a motion for judgment notwithstanding the verdict and UTC appealed. The court of appeals reversed, finding as a matter of federal law that UTC satisfied the requirements of the military contractor defense. The Supreme Court granted **certiorari**.[288]

Plaintiffs challenged three aspects of the decision: federal law did not shield government contractors from liability for design defects in military equipment; even if there was law to that effect, the court improperly applied it; and the court should have remanded the issue to the jury. The Court held that federal preemption applied. The opinion was premised upon the impact of state law liability on government procurement:

> The imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected.[289]

The court of appeals relied on **Feres** as the source of the federal-state law conflict, but the Supreme Court rejected this analysis. Reliance on this doctrine would produce results that were both too broad and too narrow.[290] The discretionary function exception applied.[291]

The "military equipment" defense applied. Liability cannot be imposed under state law if: the United States approved

reasonably precise specifications; the equipment conformed to those specifications; and the supplier warned about dangers known to the supplier but not to the United States.[292]

This decision did not define "military equipment." Lower courts have not done so either.[293] But the defense does not apply "[w]hen only minimal or very general requirements are set for the contractor by the United States."[294] It does not apply to manufacturing defects,[295] though it may apply to performance contracts.[296]

IV. THE STANDARD OF CARE

A. The Law of the Place: State or Federal?

The government is liable "under circumstances where the United States, if a private person, would be liable . . . in accordance with the law of the place where the act or omission occurred"[297] and "in the same manner, and to the same extent as a private individual under like circumstances . . . ."[298]

The Act doesn't say "under state law." It says under the "law of the place" but this phrase is not defined. Since the FTCA doesn't apply to claims arising in a foreign country,[299] Congress may have intended to limit liability to situations where the United States was acting as sovereign and not, necessarily, to claims arising under state law. The Act also says "private person," yet one court held that if local law does not provide a private person standard, courts may apply standards applicable to state or municipal governments.[300]

These standards may conflict. Duties imposed by federal law may have no state analog, yet in many cases private persons are required to follow federal law.[301] But duties arising solely under federal law do not suffice because the FTCA is a procedural remedy only. It conveys no substantive rights not existing under state law.[302] Since the Act waives immunity even for governmental functions, it would seem reasonable to expect liability to attach when an agency negligently follows its statutory authority and controlling regulations. But this is not the case.[303]

Chen v. United States[304] held that tort allegations involving federal procurement laws and regulations were not actionable. The Second Circuit affirmed:[305]

> Clearly, violation of the government's duties under federal procurement regulations is "action of the type that private persons could not engage in and hence could not be liable for under local law."[306]
>
> . . . .
>
> None of the . . . cases cited . . . and no case we have discovered, recognizes a cause of action in tort for an association's violation of its own rules . . . .[307]

To recover for violation of federal law or regulations, plaintiffs must show some state law analog.[308] If one exists, federal law may "provide the standard for reasonable care in exercising the state law duty,"[309] and may "be relevant in defining the scope of the undertaking and the plaintiff's right to rely thereon."[310] If an agency fails to follow a federal regulation, it is only liable if "under state law criteria, it may be considered the kind of . . . regulation violation of which is negligence per se."[311]

Courts have addressed this issue in cases involving military regulations. **Lutz v. United States**[312] involved a military member's failure to control his dog. This violated a regulation placing responsibility on the security police and the individual resident of base quarters. The regulation's purpose was to "promote health and safety on the base, to ensure that the base functioned properly, and to assure that residents did not infringe their neighbor's rights."[313] This duty was delegated to base residents who were subject to military discipline if they failed.[314]

The court noted that scope of employment is defined by state law respondeat superior principles.[315] State law did not impose liability where employees act entirely for their own benefit.[316] Since the duty to control had been delegated, it was a military duty within the scope of employment.[317] But violation of the regulation wasn't dispositive--there must be some underlying state law duty:

> Even when the injury occurs on federal property, the finding of negligence must be based upon state law. . . . Thus any duty that the United States owed . . . cannot be founded on Base Regulation 125-5; its source must be [state] law. . . . The federal statute or regulation . . . only becomes pertinent when a state law duty is found to exist . . . [and] may then provide the standard for reasonable care in exercising the state law duty.[318]

State law imposed strict liability upon dog owners by statute. Since plaintiff was a member of the class intended to be protected and the dog owner a member of the class to be controlled, violation was negligence per se.[319]

Nelson v. United States[320] came to the same conclusion for a different reason. The court focused on the military's duty of care toward invitees and specifically rejected the "scope of employment" reasoning employed by the Ninth Circuit.[321] Instead, the court looked to whether the particular activity violated a state law duty.[322] Since there were prior reports of attacks by the dog involved, the government failed to exercise reasonable care under the circumstances.[323]

Yet in **Berkovitz v. United States**,[324] the Supreme Court held that an agency's failure to follow a mandatory federal regulation did not constitute a discretionary act immunized by Section 2680(a). Though the opinion didn't address the issue, lack of a state law analog should have precluded jurisdiction. The Court reversed and remanded to determine whether a mandatory regulatory duty had been violated. Subject matter jurisdiction is never waived; if federal law cannot serve as the basis for FTCA liability, the Court should not have reached this issue.

B. Specific Applications

1. Medical Malpractice

In medical malpractice cases, the standard applied depends upon whether state law applies the locality or national rule. The locality rule requires a doctor to comply with the standard of care exercised by similarly trained and equipped physicians in the same or similar locality and was described as follows:

> To prevail in a medical malpractice action a plaintiff must prove that a doctor failed to exercise degree of skill usually exercised by the average practitioner acting in the same or similar circumstances. . . . In order to exercise the

> appropriate degree of skill, a doctor must possess that degree of skill or care or the medical judgment necessary to allow him to exercise it. By taking the responsibility for a surgical procedure, a surgeon represents that he possesses the skill and care ordinarily possessed by persons performing similar procedures.[325]

Some jurisdictions apply a national standard. Consequently, experts from outside the court's jurisdiction may testify as to the appropriate standard of care:[326]

> In a malpractice case, the duty of care imposed on a medical specialist is governed by the standard of care within the specialty itself, regardless of the locality where the operation was performed. That principle, which goes to the core of determining the liability of a defendant physician, is now recognized as the law of Louisiana . . . . Accordingly, we reverse . . . .[327]

2. Dangerous Instrumentalities

Courts have applied a higher standard of care to dangerous activities. Cases involving explosive ordnance routinely apply a higher standard if state law so provides. In **Garza v. United States**,[328] the Fifth Circuit stated that "considering the elevated duty of care imposed by Texas law on those who use and handle explosives, we are not prepared to say that the trial court erred factually or legally in finding the government negligent for its failures in the use, monitoring, and control."[329]

Where electricity is involved, state law may also impose a higher duty of care. **McGarry v. United States**[330] held that the "duty of care created by the ownership of electrical facilities and electricity is a higher standard of care than is normally required by a landowner."[331] The court cited **McCormick v. United States**[332] where a painter was injured by electrical transmission lines and **Hamilton v. United States**[333] where a contractor's

employee was electrocuted. In **Underwood v. United States,**[334] the Fifth Circuit imposed a higher duty of care in a case involving negligent release of a firearm to a mentally disturbed policeman.

3. Time of Application

The standard is the one existing at the time of the injury. As one court noted:

> Of course, current standards also require that such tests be performed. In this case, the conduct of the United States must be measured against the standard of what a reasonable person would have done in the early 1950's when the toxicity tests were performed. Thus, whether specified or not, all references in this opinion are to the standards that prevailed when the act in question was performed in the early 1950's.[335]

In medical malpractice cases, courts apply the standard existing at the time the injury was inflicted.[336]

V. THE SCOPE OF EMPLOYMENT

The FTCA imposes liability for tortious conduct occurring within the scope of federal office or employment.[337] Scope of employment is defined as acting in line of duty.[338] The question of who is included within the definition of employee and for what conduct is a combination of both statutory language and judicial decision.

A. The Statutory Definitions

The FTCA defines employee as:

> . . . officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.[339]

The definition of federal agency specifically excludes "any contractor with the United States."[340]

B. When Is An Employee An Employee?

The scope of employment issues require analysis of state law respondeat superior principles.[341] Individuals on leave are not, ordinarily, acting within the scope of employment.[342] Travelling on military orders with or without leave en route is a more difficult question. Federal judges[343] and even volunteers[344] are employees. But Junior Reserve Officer Training Corps (JROTC) instructors are not.[345] National Guardsmen on state orders are not employees of the federal government,[346] even though they are barred from maintaining tort claims under the **Feres** doctrine.[347] Undercover operatives and informants are usually not considered employees or agents of the federal government.[348]

C. Deviations

1. Travelling

Courts apply the usual rules in deviation cases. When employees stray outside the route required for a particular function, they are not within the scope of employment and the government isn't liable.[349] When military personnel are involved, the issues may be more complicated, particularly in the Ninth Circuit.

For example, in **Chapin v. United States,**[350] an Army Private was driving his automobile between military installations under permanent change of station (PCS) orders authorizing use of his own vehicle and four days delay en route. The accident occurred on the first day of travel. The government's motion for summary

judgment was sustained. Applying California law and ignoring the private's military status, the Ninth Circuit affirmed. The key was whether the employer had the opportunity to control every detail of the employee's conduct at the time of the injury and whether the employee's job duties included the activity involved.[351]

But another Ninth Circuit decision considered military status important.[352] In this case, military personnel were stationed at a remote site. Their commander authorized use of a military truck for off duty recreation. The accident resulted from negligence within the scope of the driver's employment. The court recognized the need to provide recreation to isolated troops.[353] The dissent argued that whether the driver was authorized to use the truck for recreational purposes was immaterial.[354]

In **United States v. Romitti**,[355] the same circuit addressed a case where civilian employees were placed on temporary duty (TDY) travel orders. They used a private vehicle[356] and had an accident. The court noted that:

> . . . Mr. Moore was travelling on direct orders of his employer and for the sole purpose of serving his employer's business . . . was transporting property of the employer and fellow employees (including his supervisor) . . . was travelling on the most direct route between two of his employer's work locations . . . was using an expressly authorized means of transportation . . . was driving during regular working hours . . . was being paid his regular salary plus per diem, plus costs of transportation.[357]

This activity was within the scope of employment.[358]

Yet in Washington v. United States,[359] the same circuit held that violation of base housing regulations[360] (covering fire prevention and automobile repair work) resulted in liability. The tortfeasors were off duty and not employed in either capacity. The court looked directly to military status and found scope of employment:

> . . . the duty to adhere to fire regulations and not to engage in fire hazardous operations without the establishment of adequate fire prevention measures was a military duty imposed for the benefit of the Navy by Navy regulations on servicemen in the Point Mugu naval housing. It is difficult to think of an older or more critical military duty imperative than the prevention of fires in camps or quarters.[361]

Other circuits do not agree with this analysis.[362] In Platis v. United States,[363] the Tenth Circuit found a military member within the scope of employment while driving on permanent change of station (PCS) orders. He was driving his vehicle on a direct route between installations. The court commented on the private person standard:

> But at the outset, we must negative the persuasiveness or compulsion of state law affecting the application of liability under [the FTCA] for the torts of military personnel by analogy with traditional employer-employee relationships and the acts and duties in common business affairs. For example, the United States here argues that Airman Williams' military assignment was that of a draftsman and that he wasn't hired to drive a car.[364]

The Third,[365] Fourth,[366] Fifth,[367] and Eighth[368] Circuits agree as do several district courts.[369] They generally hold it is not necessary that employer's control every detail of the employee's conduct nor must his duties include the precise conduct at

issue.[370] This split of authority[371] is widened even further where the employee is on a personal deviation.[372]

2. The Borrowed Servant Rule

This rule is applied according to state law principles. **Green v. United States**[373] involved a military physician at a civilian institution under a fellowship training program. Although the physician provided care to the latter's patients, the court found he wasn't a borrowed servant but[374] remained an employee of the federal government.[375]

Another case[376] involved a contractor's employee injured by "loaned" federal employees. The contractor was building a dam. A flood occurred, beaching one of the its boats. The contractor asked the Corps to furnish a landing craft and operators to help recover the boat. The operator was injured during the recovery operation. The court focused on whose work was being done and held that the federal employees were acting on behalf of the contractor. The Ninth Circuit reversed. The "whose work" question was not dispositive:

> If a servant on the payroll of one employer is ordered by his employer to go help another employer without any consideration passing between the two employers, it would appear a fortiori, that the travelling servant remains primarily under the direction and control of his master who is paying his wages.[377]

In both cases above, the rule was applied to find the employee within the scope of employment. Other decisions have found the government not liable in appropriate circumstances.[378]

3. Criminal Acts

Courts generally conclude that criminal acts of federal employees do not result in liability.[379] Accepting bribes, for example, is not within the scope of federal employment.[380] These cases turn on foreseeability and proximate cause.

a. Explosives

In **Garza v. United States,**[381] a thirteen-year-old was injured by an explosive device found in a recently vacated apartment. The device was stolen by a military member from a remote site after a training exercise. After keeping it for some time, the airman gave the device to a roommate and moved out. The roommate left it in the apartment when he moved. The child found it, hit it with a hammer, lit the powder that spilled out and was burned. The Air Force denied liability but the district court found for the child.

The Fifth Circuit reversed. The Air Force was negligent in failing to properly police the site where the explosives were used and in failing to properly account. But the injury was too remote in time and place to have been foreseeable.

Mere negligent deviation from the scope of employment does not break the chain of causation. **Williams v. United States**[382] involved use of another explosive training device. An Army Sergeant negligently failed to turn one in at day's end as required. He found it at home, put the explosive in a dresser drawer and forgot about it. Several months later, the device was found by a babysitter who set it off and was injured. The court concluded that "since the Government authorized [the Sergeant] to

handle simulators in line of duty, the Government must answer for his careless mishandling of them."[383]

Theft of explosives from a secure[384] location by an Army Private assigned to guard the facility was not within the scope of employment:

> . . . stealing government property is not an act in line of duty or within the scope of employment of a member of the armed forces. Nor was he acting in line of duty or within the scope of employment when he gave some of the stolen goods to a third party.[385]

b. Assault and Battery

Assault and battery claims are not analyzed using scope of employment principles. These claims are expressly excluded by Section 2680(h). When they occur between two active duty military members, the **Feres**[386] rule is applied.[387]

Where assault or battery is merely the foreseeable result of independent negligence by other[388] employees, liability may be imposed. In **Sheridan v. United States**,[389] an off duty, inebriated Navy corpsman fired at a vehicle causing injuries and property damage. Navy regulations prohibited possession of firearms but other corpsmen, who knew the assailant was drunk and saw his rifle, failed to take appropriate action. Their independent negligence allowed a foreseeable assault and battery to occur.[390] In a footnote, the Court stated that since the assailant's status as a federal employee was irrelevant, it would not "consider whether negligent hiring, negligent supervision or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee."[391]

Though acknowledging the statutory language "arising out of"[392] was broad enough to bar any claim, the Court looked to the **Muniz** decision and stated:

> Nonetheless, it is both settled and undisputed that in at least some situations the fact that an injury was directly caused by an assault or battery will not preclude liability against the Government for negligently allowing the assault to occur.[393]

D. The Independent Contractor Exclusion

The definition of federal agency expressly excludes independent contractors.[394] Generally, the government is not liable for their actions.[395] This rule is not universal and is constantly tested. For example, in **United States v. Orleans**,[396] the government provided substantial financial assistance to a community action organization, but this did not convert that entity into a federal agency.[397] A prior decision held that employees of a county jail under contract with the government were not federal employees, even though the government could take action to compel compliance with federal standards.[398] Another decision stated that:

> The United States cannot be held vicariously liable for the negligence of an independent contractor because one of its own employees has not committed a negligent act or omission. . . . Further, the United States will not be held liable for the negligence of an independent contractor, even when that contractor is performing a nondelegable duty owed by the United States. Even though the duty is nondelegable, if the negligence is by the independent contractor, it is not a negligent act or omission by a United States employee, so there is no government liability.[399]

E. The New Requirement

The FTCA was amended in 1988 to require DOJ to certify scope of employment in cases against individual employees.[400]

Previously, certification was required only for automobile accidents but the amendment extended this requirement to all negligence suits against individual employees. If DOJ refuses to certify, employees may petition the court for certification any time during the course of litigation.

VI. CONTRACT OR TORT CAUSE OF ACTION?

Tort claims arising in a contractual setting are maintainable despite the existence of a remedy under contract statutes.[401] The seminal case is **Aleutco v. United States**,[402] an action for conversion by a purchaser of war surplus materials. Aleutco had removed most of its property from a storage area but one boatload remained. While negotiating with Aleutco for retrieval of the balance, the Navy ordered the property removed and sold to a third party. The district court awarded judgment for Aleutco and the government appealed. It argued that the action was founded solely in contract, that the Tucker Act[403] applied, and that the case had to be dismissed because the damages exceeded the district court's jurisdictional maximum. The Third Circuit affirmed.[404] In addition, the claim was not barred by the exclusion of claims for interference with contract rights.[405]

Six years later, the Ninth Circuit decided **Woodbury v. United States**.[406] This case involved a government contractor who alleged the United States had "carelessly and negligently or deliberately and willfully breached"[407] a fiduciary relationship arising out of contract. The contractor filed suit in both the

district and claims courts. The Court of Claims action was stayed pending decision under the FTCA. The district court held the Tucker Act applied and dismissed for lack of jurisdiction. The Ninth Circuit affirmed, noting that "[a]llowing the plaintiff to waive the breach and sue in tort would destroy the distinction between contract and tort preserved in the federal statutes."[408] The court did note, however, that there may be overlap.[409] It distinguished **Aleutco** by finding the breach of contract was "mere background"[410] for the tort which was only relevant as a defense.[411]

Two years later, the Eighth Circuit decided **United States v. Pieter Kiewit Sons.**[412] Kiewit leased construction equipment and operating personnel to the government. One of its trucks was damaged while being operated by a Kiewit employee who was allegedly supervised by a government employee. The contract provided that "[A]ny dispute concerning a question of fact arising under the contract which is not disposed of by agreement shall be decided by the Contracting Officer . . . ."[413] The Contracting Officer's opinion, which could be appealed within thirty days, found that the accident was caused solely by the government driver's negligence. Since the driver was a "borrowed servant" of Kiewit's, the government was not liable and the claim was denied.

Within thirty days, Kiewit withdrew this claim and submitted one under the FTCA. The district court granted judgment for Kiewit and the government appealed. The court of appeals reversed and remanded, instructing the district court to enter

judgment for the United States because a tort remedy was not available:

> The disputes clause, which covers "any" factual disputes arising under the contract, necessarily includes claims that might possibly have their basis in tort, as referred to in Article 5, as well as for breach of contract. It was a question of fact under the contract whether the truck driver was an employee of Kiewit or an employee of the Government under the "loaned-servant" doctrine . . . .[414]

Since Kiewit pursued the tort and failed to file a contract appeal within thirty days, it had no recourse. The tort claim was dismissed because it was "clear that the disputes clause encompassed any disputes arising under the contract...[and] necessarily includes claims that might possibly have their basis in tort . . . as well as for breach of contract."[415] The reasoning in Kiewit has been criticized.[416]

The contract disputes clause applies only if complete relief is available under another specific contract provision. However, "if a fair reading of the particular contract shows that the specific dispute has not been committed to agency decision, the claims are then for 'pure' breach of contract and are considered de novo in this court."[417]

In sum, an independent contractor may maintain an action for and recover damages under the FTCA when the tort involves, relates to, or arises under the contract even though a contractual remedy exists under the Contract Disputes Act. Stated another way, government contractors are not categorically excluded from recovery under the FTCA.

VII. POTENTIAL THEORIES OF LIABILITY

Whether particular conduct is actionable is largely controlled by state law tort principles. Some aspects of federal law, however, are superimposed over state law and the result is not always strictly in accordance with the law of the place. That is, even where state law would provide a remedy, the discretionary function exception[418] and other statutory[419] or judicial[420] defenses may preclude recovery.

The Act waives sovereign immunity for negligent or wrongful acts or omissions.[421] If state law imposes a higher duty of care than applies in "ordinary" negligence cases, that higher duty may apply. Strict liability theories do not. Some wrongful conduct is specifically excluded,[422] as are constitutional torts.[423]

A. Negligence

1. Failure to Warn

Courts have imposed liability on the government for failure to warn. These cases usually require analysis of the discretionary function and misrepresentation exceptions as well as the Feres doctrine. With the exception of medical malpractice cases, which routinely apply failure to warn concepts where informed consent [24] is an issue, these cases highlight the difficulties courts encounter in determining what actions are allowed under the FTCA.

a. Discretionary Function Exception Inapplicable

In Mandel v. United States,[425] a camp counselor was injured in a diving accident. After several days of swimming, plaintiff dove into the river and hit his head on a submerged rock. The

injury occurred on private property contiguous to several thousand acres supervised by the National Park Service. On arrival, the counselors asked a park ranger where the best place was to swim. He suggested the area where the injury occurred.

The Eighth Circuit found the government liable because the Park Service knew about submerged rocks, had distributed warning brochures, and posted warning signs at some locations. At least two accidents occurred in the preceding two weeks. The discretionary function defense did not apply since "[t]he judgment and decision-making involved in day-to-day management of a recreational area [was] not the sort of decision-making contemplated by the exemption."[426] The court agreed "with the district court that once the Park Service chose to furnish its patrons with information . . . it had a concomitant duty to exercise reasonable care in doing so notwithstanding the private ownership of portions of adjoining land."[427]

Other cases suggest that liability attaches when the government fails to warn.[428] In **Coates v. United States**,[429] a camper was killed by a flash flood caused by dam failure in the Rocky Mountain National Park. Park officials were aware that an upper dam had broken, but their warnings were nonchalant. There was no emergency evacuation plan even though the area was subject to sudden dangers from both natural and man-made causes. Plaintiff's alleged failure to inspect, failure to plan and failure to warn.

The inspection claim was unsuccessful because the defect wasn't readily apparent by inspection immediately before the

break. The court was more concerned with the second and third allegations. The government was negligent in failing to develop an evacuation plan[430] and for failure to warn:

> The exercise of reasonable care mandated, at a minimum, the issuance of careful and complete warnings to all of the people who were camped in or otherwise using areas of the park downstream from Lawn Lake Dam. The failure to issue these warnings constitutes negligence and . . . that negligence was a proximate cause of the death . . .[431]

b. Discretionary Function Exception Applicable

In Schieler v United States,[432] the government was protected from similar allegations. Plaintiffs claimed the Park Service failed to warn visitors to Sequoia National Park of an impending storm and of possible lightning strikes. The court applied the exception.[433] Zumwalt v. United States[434] involved a fall at the Pinnacles National Monument. The court applied the discretionary function exception:

> Both the 1983 Plan and the project statement undeniably give park personnel the room to exercise individual judgment and to balance the relevant policy factors in suggesting and carrying out safety improvements. In not making prior improvement to the trail where plaintiff was injured, the Safety Committee and park personnel ostensibly had not identified that portion of the trail to be so hazardous as to require altering the wilderness character of the trail.[435]

Other decisions have applied the exception to cases involving failure to warn of safety violations at the Three-Mile Island nuclear facility,[436] failure to warn miners of risks from uranium exposure,[437] failure to warn participants in the open-air atomic bomb tests,[438] failure to warn witnesses regarding the criminal proclivities of a defendant against whom they were

testifying,[439] and failure to warn exposed employees of the dangers of asbestos.[440]

c. Of Radiation, Drugs, Discharge and Feres

Failure to warn former employees of potential injuries incurred during military service which become manifest after discharge is an issue that has vexed courts.[441] Some have distinguished three categories of cases:[442] (1) where injury occurred during military service but the effects continue after discharge;[443] (2) where the injury occurred during military service but is aggravated or supplemented by independent negligence occurring after discharge;[444] and (3) where injuries occurred during military service that are unknown at the time, and the government becomes aware of the potential injuries after the military personnel were discharged but failed to warn.[445]

Courts have applied the **Feres** doctrine to cases where the duty to warn originated during military service.[446] In **Heilman v. United States**,[447] plaintiffs' decedent was exposed to radiation from atomic bomb testing both while on active military duty and later as a civilian employee of the government. As to the former, the Third Circuit found that the **Feres** decision controlled:

> . . . it is clear at the outset that no recovery is possible for the injuries suffered by Heilman due to the original exposure to radiation which occurred while he was stationed in the Pacific. **The decision to expose him to that radiation was made while he was an enlisted man in the Navy, and therefore the United States is immune from liability . . . .**[448]

Since the government had knowledge at the time of exposure, the duty to warn arose at that time. **Feres** controlled.[449]

But post-discharge negligence aggravating an "incident to service" injury is actionable. In **United States v. Brown**,[450] a retired serviceman received medical treatment for a knee injury that occurred while he was on active duty. Although the subsequent injury would not have occurred but for military duty, the Court held that the second was an independent injury not barred by **Feres**.

The third category--where the injury occurred "incident to service" but the government was unaware of its effects--has been troublesome. In **Molsbergen v. United States**,[451] the Ninth Circuit stated that:

> Here, taking appellant's allegations as true, it is clear that Mr. Molsbergen's former employer had information about a serious threat to his life resulting from conditions to which he had been exposed in the course of his employment. In view of the available resources on which his former employer could have drawn in issuing a warning, along with its ready access to former employees of the class to which Mr. Molsbergen belonged (i.e. veterans), it is reasonable to conclude that the burden of notifying him, as well as others similarly situated, of the risk to which he had been exposed would not, relatively speaking, have been substantial. Further, since the warning would have been directed toward making Mr. Molsbergen, and others like him, "aware of the dangers to which they had been uniquely exposed," there is reason to believe that the warning would have been of substantial value to its recipients. . . . We therefore hold that a private employer would have had a duty to warn . . . of the foreseeable harm resulting from . . . exposure to radiation. . . . Since, under California law, a private employer would have had a duty to warn . . . the government did also.[452]

Other courts have recognized this issue's complexity and invariably struggle with the **Feres** doctrine.[453]

d. The Misrepresentation Exception

Claims alleging failure to warn may also be barred by the misrepresentation exception.[454] Generally, these cases hold that governmental miscommunication is not actionable, but the exception is normally limited to situations involving commercial transactions.[455]

e. Discussion

These cases suggest the difficulties involved in applying failure to warn theories against the government. Discretion is almost always involved; hence, application of Section 2680(a) pervades analysis, as does the **Feres** doctrine for military members. And the misrepresentation exception may also apply.

2. Negligent Inspection

a. Contract Cases

Reservation of the right to inspect a contractor's work does not normally impose a duty to do so. In **Grogan v. United States**,[456] plaintiffs were injured when a scaffolding collapsed. Plaintiffs argued that since the contract reserved the right to inspect, the government was negligent for failing to do so. The scaffolding was the contractor's property, and its design and material were not part of the specifications. The Sixth Circuit noted that:

> . . . the only theory upon which liability could be cast . . . was plaintiffs' claim that the Corps . . . had by contract and conduct assumed responsibility for the safety of the practices and equipment of its contractor, and that it should have concluded that the design and materials of the scaffold assembly were unsafe, or should have inspected the bolt that failed and discovered its defect, even though there was no evidence that such defect would have been discoverable

upon visual inspection. To state such a proposition is to answer it.[457]

The court approved the district court's conclusion that "the Government had the right, but not the duty" to inspect.[458] A similar result was reached by the same circuit in **Gowdy v. United States**[459] where a contractor's employee was injured after falling from a flat roof which lacked guardrails. The court concluded that "[t]he mere reservation of the right to inspect the work did not impose upon the Government any duty of inspection or control."[460]

In **Irzyk v. United States**,[461] a sewer line was installed underneath an improperly backfilled irrigation ditch. Water from the canal flooded plaintiff's property. The district court found for the government despite noting that the inspector was negligent, had not performed adequate tests for soil compaction, and had a duty to inspect and supervise the contractor's activities. The proximate cause of the injury was that the contractor had negligently backfilled the ditch. The Tenth Circuit held that:

> Thus in the case before us the right of inspection, and its exercise did not render the Government liable for the negligence of its employee--the inspector. The independent contractor owed the duty to the appellant, he was negligent, and his independent status was intact.[462]

b. Non-Contract Cases

In **Raymer v. United States**,[463] government inspectors cited a mine operator for failing to install rollover protection on bulldozers and front-end loaders. The compliance deadline was extended twice but the inspectors failed to issue citations for

lack of guardrails on an elevated levee road. Plaintiffs' decedents were killed two days after the last extension when an unprotected front-end loader rolled over on the unguarded road.

The district court granted judgment for the plaintiffs, concluding that federal law imposed a duty to see that safety regulations were vigorously and meticulously enforced. The affirmative act of perpetuating obviously hazardous conditions by granting unwarranted extensions of time to comply, in the absence of evidence that the operator could not comply, was actionable negligence.[464] The Sixth Circuit focused on the Good Samaritan rule.[465] The court concluded that there was no increase in risk because granting extensions of time merely continued the same risk, the inspectors did not undertake to perform a duty owed by the owner or operator to the decedents, there was no justifiable reliance by the owner, operator, or decedents on the inspector's acts or omissions. Federal law placed primary responsibility on the miners and mine operators.[466]

c. Discretionary Function Exception Applicable

Hylin v. United States[467] involved a clay mine where an electric junction box was located close to a conveyor belt. The junction box was damaged, dangerous and violated federal standards. The conveyor was unguarded and not equipped with emergency shut-off devices. From both regular and spot inspections, government inspectors were aware of both conditions but only issued a citation for the conveyor belt. Since emergency shut-off equipment wasn't feasible, two by four handrails were built. This construction narrowed a passageway

workers had previously used and forced them to walk through a congested area near the defective box. Plaintiff's decedent was electrocuted while walking on this new route.

The district court ruled against plaintiff on both of her theories: that the inspectors negligently failed to observe and issue citations for the junction box; and, while enforcing a mandatory safety standard, created or increased the risk of injury. The inspectors had increased the risk but this wasn't the proximate cause of the injury.

The Seventh Circuit reversed. The Good Samaritan rule supplied plaintiff with a valid cause of action because government action had increased the risk. The court found that the discretionary function exception did not apply.[468] This decision was vacated in light of **Varig Airlines**[469] and remanded. On reexamination, the Seventh Circuit found discretion and returned the case to the district court with instructions to dismiss.[470]

Other decisions have applied the discretionary function exception to conduct of Occupational Safety and Health Administration (OSHA) employees acting under OSHA directives[471] or compliance inspections.[472]

d. Discretionary Function Exception Inapplicable

In **Aslakson v. United States**,[473] a power company failed to inspect part of a lake to determine if transmission lines were high enough to allow for safe recreational use. It had raised lines on most of the lake due to a rise in lake level. Plaintiffs' son was electrocuted when his sailboat hit a power

line in a bay that was not inspected. Though the court discussed the discretionary function defense and failure to comply with safety procedures, lack of inspection was the key.

Madison v. United States[474] involved injuries at an ammunition plant operated under contract with the government. Before award, the government evaluated the contractor to determine if it had suitable technical and production capabilities. A safety survey was prepared, but its author falsely stated he had personally made the required on-site inspection. This same person, and others, were responsible for continuing safety monitoring, but they made only periodic visits and permitted several violations to remain uncorrected.

The Eighth Circuit adopted the approach of the Ninth[475] and held that the exception did not apply:

> The government may not have a legal obligation to promulgate safety rules and conduct inspections. But once it has exercised its discretion to adopt such rules and to conduct safety inspections, it is obligated in circumstances such as those allegedly present here to take reasonable steps to enforce compliance with the applicable safety regulations. . . . The failure to fulfill that obligation when the interests of safety plainly mandate it is an operational level decision that is not immune from suit under the FTCA.[476]

Another case held the government had no duty to inspect equipment leased to a private person under a lease with no inspection clauses and no supporting facts.[477]

In **Henderson v. United States**,[478] trespassers on an unused missile facility were electrocuted. Plaintiffs were injured when they tried to remove copper cable from a power pole they thought was disconnected. The area was fenced but rampant trespassing

occurred. The government was on notice of this activity from daily inspections.[479] These injuries were foreseeable. The discretionary function was rejected because the decisions involved were made at the operational rather than planning level.[480] Another court refused to apply the exception where mine inspectors wrongfully terminated a mine closure order.[481]

3. Negligent Contract Performance

In **Martin v. United States**,[482] the Ninth Circuit held the government liable for negligent contract performance. Here, plaintiff's mother had purchased a repossessed home. Before offering it for sale, the VA's manager inspected, found several defects, and recommended repairs. Because of vandalism, the VA required occupancy before repairs would commence. Plaintiff's mother moved in and repairs started. A few days later, she fell in the bathroom and was injured when a ceramic downspout shattered.

Plaintiff alleged tortious breach of a contractual duty to repair. Though the government argued the case was controlled by the Tucker Act,[483] the claim was actionable under the FTCA. Even though it involved negligent contract performance, that conduct resulted in personal injury. The court reasoned that a contract action would have involved purely economic losses[484] and affirmed because "[t]he Government obligated itself to repair inoperable or damaged plumbing fixtures, and . . . was negligent in failing to replace the spout . . . ."[485]

4. Negligent Design or Contract Specifications

The government can be held liable for negligent project design or specifications. In **Jemison v. The Dredge Duplex,**[486] the Corps planned to dredge deeper than plaintiff's wharf pilings. Dredging occurred and plaintiff's wharf was uprooted. Personnel responsible for writing specifications did not obtain information about the wharves. The government "was guilty of negligence in failing to secure adequate information as to the wharves . . . while planning the project, and in preparing specifications the carrying out of which was the proximate cause of subsidence . . . ."[487]

a. Discretionary Function Exception Inapplicable

This exception is almost always raised in these cases. In **Seaboard Coast Line R.R. Co. v. United States,**[488] a train wreck was caused by a negligently designed drainage ditch. The district court held the exception did not apply because the conduct was operational in nature and did not involve planning. In addition, the court found that water diverted by the drainage ditch constituted an actionable trespass and nuisance. The Fifth Circuit, while not deciding the latter finding, rejected the discretionary function argument and affirmed. It found that "[o]nce the government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner."[489]

Ala. Elec. Coop. v. United States[490] involved allegations that the Corps negligently designed a navigation and flood

control project. Dike construction diverted water that undermined plaintiff's transmission tower. The cost to stabilize the tower was over $576,000. The district court applied the discretionary function exception.

After reviewing both **Dalehite** and **Varig Airlines**, the court of appeals reversed. Applying the command that it must first examine "the nature of the conduct," the court concluded that not all design decisions were discretionary.[491] The court reviewed several negligent design cases involving the discretionary function exception:

> Thus, most of the cases which find a discretionary function exemption in the design context do so because the decision at issue implicated policy considerations. These cases also support the rationale that we employ in this case.
>
> In summary, we hold that where the Corps makes a social, economic or political policy decision concerning the design of a particular project, that decision is excepted from judicial review under §2680(a).[492]

Since the Corps was exercising professional judgment, its design decision was not protected.

b. Discretionary Function Exception Applicable

The dividing line is not clear. In **Payne v. United States**,[493] the Corps decided to dredge and widen a bend in the Tombigbee River. The operation caused plaintiff's home to collapse into the river. Plaintiff alleged the Corps negligently redesigned the river course. The Corps was aware that downstream damage would occur but decided not to investigate since that expense would have exceeded the amount of any potential damages.

Rather than focusing on the alleged failure in redesigning the river, the Eleventh Circuit looked to the decision involved and concluded that:

> The decision to alter the water course at this point in the river was a part of the overall decision to improve navigation on the river. Whether to conduct a study to determine where specific injury might occur was inherent in the policy and planning decision to redesign the waterway and, as such, was a discretionary function of the type exempt from review under the Federal Tort Claims Act.[494]

The **Payne** case is consistent with **White v. United States**[495] where the government let a contract to fill an abandoned mine shaft. The government drew up specifications, considered alternatives and made changes based upon a professional engineering publication. A pre-bid conference was held where contractors were told they had access to government files. A site inspection occurred later. The successful bidder attended both sessions.

The injury occurred when the ground subsided, swallowing a crane and killing its operator. Plaintiffs alleged the government was negligent in planning and supervising the project, in failing to disclose specific hazards in the contract and in failing to enforce safety standards. The court held the claims were barred.

The contract delegated safety responsibility to the contractor. It explicitly stated that the risks and conditions to be encountered were unknown and that government's files were open for review. The decision to delegate safety responsibility was a protected act of discretion, despite retention of the right

to inspect and stop work.[496] As to the alleged failure to reveal specific hazards, the court agreed with a comment made by the Fifth Circuit:

> We agree with our colleagues of the Fourth and Tenth Circuits that both the evaluation of actual or suspected hazards, and the decision to proceed in a particular manner in light of these hazards, are protected discretionary acts, not subject to tort claims in the district court.[497]

Plaintiffs argued that **Toole v. United States**[498] mandated a different conclusion. In this case, a contractor violated an inspector's specific directive to stress test a shield used to protect workers handling explosives. Prior to the explosion, the government knew the shield wasn't properly tested but failed to warn the worker. The government specifically knew what the danger was and who was at risk but failed to take proper action.

In **White**, the decision to delegate safety responsibility was discretionary.[499] As to the duty to inform the contractor of specific hazards, the court said:

> In light of the unknown condition . . . the government was forced to balance the cost of determining the condition and stability of the shaft walls against the potential benefit of such testing. In the end, the government judged, rightly or wrongly, that the best way to proceed was to warn the contractor in the contract of the unknowns and to allow the contractor to perform such tests and implement such precautions as it saw fit.
> . . . .
>
> The government's choice to disclose its knowledge . . . in this manner involved weighing costs against benefits. In this era of tight federal budgets, the decision to disclose information by making it available for inspection is a policy decision.[500]

c. Professional Judgment

Several decisions have found liability for design defects where professional judgment was involved.[501] These decisions are consistent with medical malpractice cases which generally reject this defense.[502] But some decisions hold that the exercise of professional judgment is discretionary.[503]

d. Discussion

In sum, a cost-benefit analysis will protect the government from liability even if the result is a negligently designed project. Projects that are "eyeballed" using "rules of thumb"[504] are not protected. The exercise of professional judgment is not always protected. In military procurement cases, design defects may not result in liability for either the government or the contractor.[505]

5. Negligent Supervision

a. Of Employees

Courts are reluctant to inquire into supervision issues when the negligent employee is a military member. This reluctance is premised primarily on the Feres decision. Even where a military member who is off base and on leave is murdered by another serviceman,[506] Feres precludes judicial review. As the Court recently noted in an assault and battery case, it would "not consider whether negligent hiring, negligent supervision or negligent training may ever provide the basis for liability under the FTCA for a foreseeable assault or battery by a Government employee."[507]

Other cases have imposed liability. Most involve injuries caused by intentional torts such as assault or battery.[508] In one case,[509] the government was liable for negligently supervising a mentally disturbed serviceman who murdered his estranged wife.[510] In another,[511] the government hired a civilian teacher who had criminal charges pending against him and an outstanding bench warrant. No background investigation was done and he later sexually abused several children. The government argued the discretionary function exception but was held liable for negligently hiring a person whose criminal record could have been discovered by reasonable care.

But courts have not been consistent. In Hughes v. United States,[512] a postal worker sexually molested children in his vehicle while on duty. The court held that even though the complaint was framed in terms of negligent supervision, the injuries resulted from assault and battery. Consequently, the claim was barred.

b. Of Contractors

Some courts hold the government responsible for negligent supervision, particularly where the contractor is engaged in inherently dangerous activity. For example, in Thorne v. United States,[513] the Ninth Circuit stated that:

> While generally speaking, the mere reservation of a right to inspect work performed by an independent contractor, including the right to stop the work if precautions are not taken, does not impose upon the government any duty of inspection and control, . . . this rule does not apply to a factual background, such as this, where the work is extra-dangerous.
> . . . .

> . . . . Under [state] law, the [government] had a non-delegable duty to exercise reasonable care, including the duty to see to it that the Contractor exercised such care.[514]

In a later case discussing **Thorne**, the Ninth Circuit noted that "when an independent contractor is employed to engage in work that is extra dangerous, the employer . . . has a duty to exercise reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury from the work."[515] After stating this result depended neither on strict or vicarious liability, the **McGarry** court continued by saying:

> It is not liability for the contractor's failure to exercise due care or to employ proper safety precautions. It stems from the duty of the contractor's employer to exercise reasonable care to see that the contractor abides by his responsibilities in that respect. It was breach of that duty by the employees of the government . . . that created liability . . . .[516]

Since state law imposed a duty of care on private persons in similar circumstances, the government was liable. But this need not require constant supervision.[517] The discretionary function exception did not apply. Although the decision to retain responsibility over safety was a matter of policy, the manner in which that responsibility was met was not.[518] The former conduct was protected as planning activity while the latter was unprotected operational activity.

A similar result was reached by the Ninth Circuit in **Barron v. United States**[519] where the Navy was negligent for failing to supervise. A contractor's employee was injured when a trench collapsed and partially buried him. The Navy had a general contractual duty to oversee the work and an onsite staff. The

court found that the Navy failed to enforce the contract.[520] Since only operational activity was involved, the discretionary function exception did not apply.

But in **Feyers v. United States**,[521] the court applied **Varig** to a case where the government delegated safety responsibility. The exception applied because "[t]he United States' decisions to delegate safety responsibility to Chrysler, to conduct only 'spot checks' of [its] safety programs, and to not institute a safety training program for railyard workers are . . . discretionary functions . . . ."[522]

This result was consistent with numerous pre-**Varig Airlines** decisions where delegation of safety responsibility was challenged as negligent.[523] In sum, when the government decides to delegate safety responsibility, that decision is generally immunized. Though not addressing the discretionary function exception, other decisions impose liability for negligent supervision if state law does so in similar circumstances.[524]

One post-**Varig Airlines** case applied this decision incorrectly. **Ayala v. Joy Mfr. Co.**[525] involved a coal mine explosion where 15 miners were killed. The explosion was allegedly caused by a mine inspector who negligently directed installation of electrical components. The discretionary function exception applied because federal law gave broad discretion to inspectors.

This decision misconstrued the Supreme Court's instructions. The inspector may have had discretion as to what assistance he would provide, how he would enforce safety requirements and where

he would inspect. Such activities were plainly discretionary. But here, the inspector exercised that discretion when he decided to direct the electrical installation. Any actions after that were operational. If the inspector's negligence was the proximate cause of the explosion, the government was not protected by and should have been held liable.

6. Negligent Selection

a. Of Employees

The discussion above on negligent supervision applies to selection as well.[526] Where military members are involved, courts will generally not inquire into the circumstances of their selection; this would subject military decision-making to judicial scrutiny. Courts will inquire where civilian employees are involved.[527]

b. Of Contractors

Selection of contractors is generally protected from judicial review.[528] Nevertheless, the government has been liable for such negligence. In **Melton v. United States**,[529] an absentee landowner received numerous violations from a housing agency. Shortly thereafter, she was contacted by the Redevelopment Land Agency (RLA); since the property was in an urban renewal area, she was eligible for government loans which would allow her to repair the defects.

Ostensibly, the RLA took care of everything--preparation of specifications, the loan paperwork, selection of a contractor, monitoring and supervising the work. It selected contractors from a list of those with requisite experience and licenses.

Shortly after work started, the housing agency issued a stop work order because a building permit and variance were not obtained. RLA officials assured plaintiff these were minor details and would be taken care of. A short time later, the contractor quit. A second contractor was selected but it failed to perform. Since funds were exhausted, no further work was done. The property remained vacant and was gutted by vandalism.

An RLA employee was bribed to award the first contract, though neither contractor was qualified.[530] The project failed because it was not properly planned, the contractors had no prior experience, the first one was dishonest, the second lacked financial and managerial capacity, and the job was not properly monitored.[531] The government argued contributory negligence and that the action was barred by the misrepresentation or discretionary function exceptions. The court found no contributory negligence. As to misrepresentation, it noted:

> To be sure, misrepresentations were made . . . regarding the competence of the contractors and the progress of the work on the project, but these representations were incidental to the real fault ascribed to the government--the acts of selecting incompetent contractors and supervising them in a careless manner.[532]

The discretionary function exception did not apply because high level decision-making wasn't involved. Contractors were put on the eligible list if they had the prerequisites, and contracts automatically went to the lowest bidder. The court felt that "[o]ne or more relatively low-level employees simply failed to carry out with due care what their job descriptions required them to do."[533]

The court was troubled by the impact of the bribery and found that criminal activity of this sort was not within the scope of employment. It nevertheless held the government liable for failing to properly supervise the bribed employee and because other employees negligently prepared the contractor list and failed to exercise due care.[534]

B. Wrongful Acts

As noted above, the FTCA extends liability beyond mere negligence to other wrongful acts. Since the legislative history is not particularly clear about what conduct this language embraced,[535] courts have struggled. As always, the discretionary function exception is a key factor.

1. Landowner Liability

Weiss v. United States[536] involved a helicopter crash allegedly resulting from failure to identify a tramway cable on airspace obstruction maps. The Tenth Circuit found that failure to mark the obstruction was a discretionary act. Agency regulations stated that such obstructions "should"--rather than "shall"--be marked. Nonetheless, state law would have imposed a duty to warn in similar circumstances. The district court's decision was reversed with instructions to inquire further into potential state law liability.

Walsh v. United States[537] involved an easement which plaintiffs sold to the government in 1960. The easement crossed plaintiffs' cattle pasture. Almost twenty years later, the government conveyed it to a mining company. Guards used to contain plaintiffs' cattle were damaged.

The government argued that the claim sounded in contract, not in tort and that the court lacked jurisdiction. The district court dismissed and plaintiffs appealed.

On appeal, the government persisted in its jurisdictional argument. The court first addressed the concern of whether state law provided an appropriate duty:

> We are, nevertheless, confident that if the case should arise, Montana courts will hold that the private owner of an easement has the privilege and duty of repair and maintenance to prevent unreasonable interference with the uses of the servient tenement and is liable for damages caused by failure or neglect to perform such duty.[538]

But the court still had to deal with the contract argument. It reviewed the cases discussed above[539] and concluded it had "no difficulty in this case in distinguishing **Woodbury** on the same reasoning that **Woodbury** distinguished **Aleutco**, that is to say, this action is essentially one sounding in tort while **Woodbury** was essentially an action sounding in contract."[540] The complaint alleged a cause of action.[541]

In **Angel v. United States**,[542] plaintiff's decedent was killed while sandblasting a building. His employer was a sub-contractor of a sub-contractor. A platform near the building to be painted held electrical transformers. Several power lines ran from these transformers and one supporting pole was marked "Danger: High Voltage." Plaintiff's decedent was electrocuted when his aluminum ladder touched a power line.

The contract delegated safety responsibility to the general contractor. It included several specific provisions of OSHA but "these provisions were not referenced in the subcontracts, nor

were subcontractors present at a preconstruction meeting with [the general contractor] and government representatives at which safety and the applicability of OSHA regulations and other safety provisions were discussed."[543] The court of appeals wasn't satisfied with the trial court's review of Ohio law and reversed. The trial court was required to determine if state law imposed a duty on landowners to warn about the hazards of electrical power facilities.[544] The district court was correct in rejecting the discretionary function exception.[545]

In **Stanley v. United States**,[546] a contractor's employee was painting a radio tower. He was working on a platform with a square ladder hole and apparently forgot about the hole and fell. Applying state law, the court concluded "the United States should reasonably have foreseen that painters, particularly if inexperienced, might lose both sight and consciousness of the nearby, unguarded hole in the otherwise safe platform and back, trip or otherwise fall into it unless safety precautions were taken."[547] The court rejected the government's argument that the exception applied:

> Had the evidence warranted the conclusion that railings would have interfered with the electronic performance of the tower or with its usefulness in other respects, the omission of the railing might have fallen within the "discretionary function" exception. But here, apart from a slight cost increase, the decision of the United States as property owner involved no competing policy concerns.[548]

In sum, where state law imposes a duty on landowners to exercise reasonable care under the circumstances, that liability may apply. Though courts are split, this duty may approach

strict liability. If state law imposes a higher duty for dangerous activities, the government may be liable to contractor employees and the public for non-delegable duties.[549]

2. Conversion

Conversion claims are generally actionable. The outcome varies with the court's characterization of the action as tort or contract: "[t]he fact that the claimant was in a contractual relationship does not convert an otherwise tortious claim into one in contract."[550]

In **Love v. United States**,[551] plaintiffs' loans from the Farmers Home Administration (FmHA) were allegedly secured by liens on farm animals and equipment. FmHA took possession of the collateral and sold it, without notice or hearing. Relying on **Woodbury**,[552] the district court held that the claim sounded in contract. The court of appeals reversed and remanded.

Other courts have reached similar results in cases involving grain shortages in a government authorized grain elevator,[553] allowing access to safe deposit boxes to someone the government knew would abscond with plaintiff's property,[554] negligently allowing a fire to destroy plaintiff's rights under a lumber contract,[555] coercing a compromise by duress,[556] and failing to deliver imported goods after customs inspection.[557]

But several decisions are to the contrary. For example, in **Darko v. United States**,[558] plaintiffs alleged the FmHA tortiously breached an implied tort obligation of good faith. The district court discussed the issue as follows:

> If this court were to allow the Darkos to prosecute their claim under the FTCA, it would be ignoring the distinction between contract and tort preserved in the federal statutes. Realization of the potential for destruction of that distinction, and ultimate subjection of the Government to liability in the manner prescribed by the legislatures and judiciary of the several states, is, of course, what prompted the Ninth Circuit's rationale in **Woodbury** . . . .[559]

Another case barring action under the FTCA involved an agency's refusal to release collateral allegedly held under the terms of a contract.[560] The **Feres** doctrine will bar such claims by military members.[561]

3. Trespass

Dalehite acknowledged, based on the legislative history,[562] that the FTCA covered more than just negligence actions.[563] The possibility of liability for trespass has been recognized since at least 1948. **Lemaire v. United States**[564] implicitly recognized the validity of such claims. The government condemned part of plaintiff's property, drilled wells below plaintiff's, and withdrew large quantities of water. Plaintiff's wells were drained and her property depreciated in value. Though not addressing the merits, the court denied a government motion on the statute of limitations.

In **United States v. Gaidys**,[565] a jet crashed in plaintiffs' neighborhood causing injuries and property damage. The court looked to state law and found that a private person would be liable:

> And we are clear in the view that the flying of a plane below a safe altitude immediately adjacent to the property of plaintiffs, the crash, and the resulting injuries sustained by plaintiffs, constituted a redressible wrong in the nature of trespass for which

the United States is similarly liable under the Tort Claims Act.[566]

Hatahley v. United States[567] involved claims by eight Navajo families[568] who sought damages for destruction of their horses. The district court awarded damages and enjoined the government from further interference but the court of appeals reversed.[569] The facts showed blatant disregard of plaintiffs' rights.[570] The Supreme Court rejected the discretionary function exception[571] and concluded that "[t]hese acts were wrongful trespasses not involving discretion on the part of the agents, and they do give rise to a claim compensable under the [FTCA]."[572] Another case imposed liability for a contractor's trespasses,[573] and one suggested liability could be imposed due to leasing activities on land created by river accretion.[574]

4. Nuisance

Nuisance claims are troubling due to the overtones of strict liability involved. Invariably, courts discuss the **Dalehite** decision.[575] One court stated that "the FTCA does not extend to actions based on nuisance,"[576] but others do not reject such theories out of hand.[577] For example, in **New York v. United States**[578] the court noted that "[s]ince plaintiffs allege a negligent creation and negligent maintenance of a public nuisance, defendant's negligence must be proven and the claims could be actionable . . . ."[579]

The confusion may be due to general misunderstanding of what conduct is actionable as a nuisance:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word

> "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.[580]

At common law, liability may attach to intentional or negligent interference with plaintiff's interest inherently or abnormally dangerous or extra or ultra hazardous actvity.[581] The interference may affect the plaintiff alone or the public generally.[582]

Some decisions implicitly recognize nuisance claims as actionable. In **Routh & Sons v. United States,**[583] plaintiffs alleged negligent creation of a nuisance. The district court granted the government's motion for summary judgment and dismissed. The government argued that nuisance claims were "in reality claims for strict liability . . . which [are] not recognized under the [FTCA]."[584] The Tenth Circuit found a genuine issue of material fact and reversed. If such claims are not actionable, the district court decision should have been affirmed.

Other decisions are more explicit. In **Jennings v. United Stztes,**[585] plaintiff's decedent was killed on the Suitland Parkway in Maryland. The district court initially found for plaintiffs[586] but the decision was reversed.[587] Without retrial, the court found additional reasons to support its initial holding:

> The court, after a study of the memoranda submitted . . . and a reconsideration of the record . . . finds as facts that the Suitland Parkway, at the time in question, was defective, both in design and construction, and as so constructed and maintained constituted a nuisance; that reasonable care to abate such nuisance was not exercised by the defendant after

> both actual and constructive notice; that such defective condition was the effective, or at least an effective, cause of the injury . . . and that the ice formed as a result thereof was allowed, after actual and constructive notice, to remain without defendant taking effective steps to abate the condition, and that the injuries complained of resulted from such conditions.[588]

The court of appeals affirmed because "[t]he District Court was well within permissible bounds in basing liability upon the maintenance . . . of a nuisance for a long time, after ample notice, by knowingly allowing a hazardous condition to remain unabated . . . ."[589] In finding that the government negligently created, maintained and failed to abate a nuisance, the court imposed liability and avoided the strict liability question altogether.

5. Misrepresentation

Section 2680(h) excludes claims arising from misrepresentation and deceit. Although this language is clear, its application by the courts has been confusing.

In **Neustadt v. United States**,[590] home buyers alleged their property was negligently inspected and appraised. The appraisal report was given to plaintiffs at closing. After moving in, they noticed "substantial cracks in the ceilings and . . . interior and exterior walls throughout the house."[591] Repair contractors could not determine the cause so the original builder and four government inspectors investigated. They found the house was built on clay, there was poor surface drainage, and the foundation had shifted.

The district court found that plaintiffs had "in good faith relied upon the . . . appraisal" and that "reasonable care by a qualified appraiser would have warned" of this "serious structural defect."[592] Damages were awarded. On appeal, the Fourth Circuit affirmed.[593]

The government argued on appeal that since Section 2680(h) used both "misrepresentation" and "deceit," Congress intended to exclude both intentional and negligent misrepresentation.[594] The Court focused on a case[595] where federal officials inspected plaintiff's cattle, determined they were diseased and issued an inspection report to that effect. Plaintiff sold the cattle at less than fair market value if healthy but later learned the inspectors were wrong. Hall sought recovery, alleging the underlying inspection was negligent. The court of appeals rejected this approach:

> We must look beyond the literal meaning of the language to ascertain the real cause of complaint. . . . Plaintiff's loss came about when Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were [not] . . . . This stated a cause of action predicated on a misrepresentation [which] . . . was meant to include negligent misrepresentation.[596]

In Neustadt's case, the Supreme Court reversed, basing its decision on the legislative histories of both the FTCA and the loan program. The appraisal process was intended to protect the government, not the borrower. Any duty created by that process did not extend to the Neustadts. The statute's use of the words "misrepresentation" and "deceit" meant Congress intended to bar all such claims regardless of cause. Finding it almost

impossible to separate the negligence and misrepresentation, the Court held that the misrepresentation was primary. The decision relied upon language in **Indian Towing** that "[t]here is nothing in the [FTCA showing] that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."[597]

Twenty-two years later, the Court was again faced by intertwined negligence and misrepresentation. In **Block v. Neal**,[598] the Court held negligence claims with an independent factual basis actionable even if misrepresentation occurred also. Plaintiff obtained an FmHA loan to build a home. The contract required the builder's work to conform to plans approved by the FmHA and gave FmHA the right to inspect and test. There were several inspections but, after moving in, plaintiff discovered numerous defects. The builder and FmHA denied responsibility so plaintiff took action under the FTCA. The complaint was dismissed at trial[599] for failure to state a claim. The Sixth Circuit reversed, holding that the exception did not apply.[600] The government appealed, seeking review of this apparent conflict with **Neustadt**. The Supreme Court explained:

> We cannot agree with petitioners that this case is controlled by **Neustadt**. As we recognized [there] the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies. The gravamen of . . . **Neustadt** was that the plaintiff was misled by a "Statement of FHA Appraisal" prepared by the Government. Neustadt alleged no injury that he would have suffered independently of his reliance on the erroneous appraisal. Because the alleged conduct that was the basis of his negligence claim was in essence a negligent misrepresentation, Neustadt's action was barred . . .[601]

The Court continued by describing the exclusion:

> Section 2680(h) . . . relieves the Government of tort liability for pecuniary injuries . . . wholly attributable to reliance on . . . negligent misstatements. As a result, the statutory exception undoubtedly preserves sovereign immunity with respect to a broad range of government actions. But it does not bar negligence actions which focus not on the Government's failure to use due care in communicating information, but rather on the Government's breach of a different duty.[602]

Government misstatements were essential to the **Neustadt** claim but not to Mrs. Neal's case.[603] Though the Court discussed the potential for overlap,[604] these cases are difficult to reconcile. In both **Neustadt** and **Hall**, the government took two actions: inspecting and communicating. The same activity occurred in **Neal**.

Some courts confine the exception to business cases.[605] In **Kohn v. United States**,[606] the court stated that cases applying this exception have involved only commercial decisions and economic loss.[607] In this case, plaintiffs alleged derivative injuries from their son's murder by a military police colleague[608] and emotional distress caused by the Army after his death.[609] The district court decided the complaint was barred by **Feres**.

On appeal, the government argued the exception applied. The court of appeals reversed and remanded to allow plaintiffs' to proceed on the emotional distress claim. The court noted that "[b]ecause the context here is hardly commercial in nature, we do not believe that appellants' claims are necessarily barred as an action for misrepresentation and deceit."[610]

The exception is also applied in failure to warn cases. In Green v. United States,[611] cattle owners sued for losses resulting from application of pesticide to grazing lands. Though DDT was banned from usage, an outbreak of Douglas fir tussock moths required its use on lands administered by two federal agencies.[612]

EPA required that ranchers be notified. To the extent possible, all livestock were to be removed. The USFS's notification letter was far more emphatic regarding the risks of residual chemicals. Both letters warned that cattle with higher residual levels could not be sold but BIA's letter failed to state that the cost of testing would be borne by the affected owners, not BIA. Plaintiffs' cattle were left on BIA land and this suit resulted. Plaintiffs alleged negligence, trespass, noncompliance with the EPA order and Fifth Amendment taking. The court held the claims were barred by the misrepresentation exception and the decision to use DDT was discretionary.

Plaintiffs argued that the misrepresentation exception did not apply if the government had a duty to provide information. The court said this was an attempt to circumvent the statute:

> The misrepresentation exception has been held to bar suits based on a failure to give any warning to injured parties. . . . Nor is the existence of a specific duty to warn the decisive factor. We think, rather, that the applicability of the exception depends upon the commercial setting within which the economic loss arose.[613]

The exception applied.

Another pre-Neal case held the government liable in similar circumstances. In Ware v. United States,[614] the government negligently misdiagnosed plaintiff's cattle as diseased. Relying

on the misdiagnosis, the government destroyed the cattle but later learned the diagnosis was wrong. Noting a similar Tenth Circuit case[615] which applied the exception, the court found that:

> The basis of Ware's tort claim is that the government negligently diagnosed his cattle as being tubercular and then destroyed them, to his damage. The government, not Ware, destroyed the cattle and caused the damage. Ware suffered damage not through any action he took based on any misrepresentation by the government, but by the government's destruction of his cattle. the government destroyed the cattle because of the alleged negligent misdiagnosis. The cases relied on by the government . . . involve situations where a plaintiff brought suit based upon a misrepresentation upon which he acted to his detriment. . . . Here, Ware committed no act. All actions were taken by the government's agents . . . .[616]

In a case decided after **Neal**,[617] the Fourth Circuit applied the exception to bar a claim for negligently misgraded cotton. Relying on the government' action, the association paid its farmers more than the cotton was worth. When the mistake was discovered, the association suffered a resale loss of several million dollars. The court focused on the miscommunication rather than USDA's negligent misgrading of the cotton and concluded "[i]t seems inescapable that had no communication of grade been made . . . there would have been no basis for any claim. The nub of the claim [was misrepresentation]."[618] The court attempted to distinguish a similar case:[619]

> The opinion in **Cross Bros.** is more difficult to reconcile with the discussion of **Neustadt** and **Neal**. However, the rationale of that opinion seems to turn on the portion of the opinion which indicates that "it's (sic) [the meats] value was not affected by Cross' reliance on government statements. 705 F.2d at 684. Certainly, in the case at bar, the loss to the Association was brought about by the reliance of the Association on government statements. In that sense,

> the opinion in **Cross Bros.** can be reconciled with the **Neustadt** and **Neal** analysis . . .[620]

6. Strict Liability Theories

Though not specifically excluding strict liability, the Act states only that it applies to negligent and wrongful acts or omissions.[621] **Dalehite** held that strict liability theories did not apply.[622] But five months later, a lower court imposed strict liability.[623] This case involved aircraft crashes on private property. Under state law, owners were strictly liable for aircraft accidents. Judge Parker interpreted the Act's legislative history somewhat differently than had Justice Reed[624] and distinguished **Dalehite** as follows:

> While language was used . . . which lends some support to the government's argument here, we do not think that the doctrine there laid down was intended to apply to a case of this sort, where the result of its application would be patently absurd. To say that the [FTCA] was not intended to cover a liability arising from the possession of dangerous property . . . is a very different thing from saying that it was not intended to apply to . . . damage inflicted by government employees merely because the law of the state imposes absolute liability for such damage and not mere liability for negligence.[625]

A district court[626] that imposed strict liability using state law principles under **Rylands v. Fletcher**[627] was reversed.[628]

Any question was laid to rest in **Laird v. Nelms**,[629] where the Supreme Court addressed property damage claims caused by military overflights.[630] The Court discussed and rejected the **Rylands v. Fletcher** theory. Noting a previous decision involving trespass by government employees,[631] the Court said:

> **Liability of this type . . . is not to be broadened beyond the intent of Congress by dressing up the substance of strict liability for ultrahasardous**

> activities in the garments of common-law trespass. To permit respondent to proceed on a trespass theory here would be to judicially admit at the back door that which has been legislatively turned away at the front door. We do not believe the Act permits such a result.[632]

The dissent noted that the doctrine of strict liability was well established when the FTCA was passed and that the legislative history stated the bill would allow suit "on any tort claim . . . with the exception of certain classes of torts expressly exempted,"[633] Justice Stewart reasoned:

> The law of most jurisdictions, however, imposes liability for harm caused by certain narrowly limited kinds of activities even though those activities are not prohibited and even though the actor may have exercised the utmost care. Such conduct is "tortious," not because the actor is necessarily blameworthy, but because society has made a judgment that while the conduct is so socially valuable that it should not be prohibited, it nevertheless carries such a high risk of harm to others, even in the absence of negligence, that one who engages in it should make good any harm caused to others thereby.[634]

Strict products liability theories do not apply[635]--even if they would under state law--nor do strict liability dramshop acts.[636] But the latter may form the basis for liability if the government was otherwise negligent. One court concluded "that the Dram Shop Act does not deprive plaintiffs of a remedy within the jurisdictional coverage of the FTCA if they are able to meet [its] requirements . . . and in addition prove [the government was] negligent according to Illinois law."[637] While state law imposing a higher duty of care may apply, strict liability does not because "Congress, by enacting the FTCA, did not intend to relinquish immunity . . . [for] strict . . . liability."[638]

7. Emotional Distress

a. Negligent Infliction

Courts have had little trouble finding that negligent infliction of emotional distress is actionable.[639] After all, the predicate for this action is negligence--conduct clearly within the Act's waiver of sovereign immunity. For example, in Holler v. United States,[640] a veteran filed an action for psychiatric malpractice by a VA physician. The psychiatrist negligently advised plaintiff he suffered from paranoid schizophrenia. This diagnosis allegedly caused emotional distress and loss of self-esteem. Eleven years later, another VA psychiatrist properly diagnosed the condition as post-traumatic stress neurosis. The district court granted the government's motion to dismiss. Since state law provided that emotional distress actions were not actionable without manifested physical injury, the Tenth Circuit affirmed. If such actions were not actionable, the court would not have considered whether state law tort elements were present. Another decision[641] was reversed and remanded to allow plaintiffs to pursue emotional distress claims.

b. Intentional Infliction

Application of the Act to intentionally inflicted emotional distress is more controversial. Section 2680(h), the "intentional torts" exception, lists eleven excluded causes of action.[642] Even though intentional infliction of emotional distress isn't listed, some courts read this subsection to exclude any intentional conduct. These courts apply the Act's "arising out of" language using the analysis in Shearer,[643] Kosak

v. United States,[644] and Neal[645] to find that the tort involved wasn't emotional distress but some other excluded theory. Others read the exception narrowly, finding that since this tort theory wasn't specifically listed, Congress did not intend to bar such claims.

In Metz v. United States,[646] plaintiffs alleged a number of intentional torts, including intentionally inflicted emotional distress. They argued that "because the torts of invasion of privacy and intentional infliction of emotional distress are not specifically listed in §2680(h), such actions against the government are not barred . . . ."[647] Although recognizing that some courts accepted this interpretation,[648] the Eleventh Circuit concluded that the "arising out of" statutory language precluded this claim.[649]

But in Gross v. United States[650] the Eighth Circuit noted that:

> More recent cases, however, implicitly reject this analysis, suggesting that courts should not read exceptions into the [FTCA] beyond those provided by Congress. . . . Congress may, of course, amend section 2680(h) at any time, either by adding the tort of intentional infliction of emotional distress to its list or by indicating that the list is not intended to be exhaustive.[651]

It rejected the government's attempt to recast the claim so as to fall within the exception.[652]

Other decisions have applied this reasoning to cases where an informant was threatened with public disclosure,[653] harassment of a strike-breaking union member,[654] the deaths of two incarcerated prisoners,[655] and release of confidential

information,[656] For military claimants, the Feres doctrine bars allegations of misuse of General Courts-Martial proceedings which cause emotional distress.[657]

c. Fear of Future Disease

Other than as discussed, infra, research revealed no cases under the FTCA where these damages were awarded. However, state law cases have allowed recovery for claims of this nature.[658]

VIII. REMEDIES

A. Damages

The Act states that district courts have exclusive jurisdiction of claims for money damages.[659] Subject only to certain federal interests, damages are awarded based upon state law. Consequently, damages in "ordinary" tort claims will include normal state law damages such as pain and suffering, cost to repair damaged property, decreased property value and the like.[660]

Neither punitive damages nor pre-judgment interest are recoverable.[661] Where state law only provides punitive damages in death claims, the statute directs "that the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."[662] Several courts have applied this command to find the excess punitive and therefore improper.[663]

Since punitive damages are not available by federal law, claimants may recover only compensatory damages as allowed by the

"law of the place." For example, in **Barrett v. United States**[664] the court awarded damages for loss of support and assistance, loss of potential inheritance, loss of parental guidance and nurture, funeral expenses, and the decedent's conscious pain and suffering.

Generally, income taxes that would otherwise have been paid must be subtracted from gross income.[665] Attorney's fees are not recoverable[666] and are specifically limited by statute.[667] "Quality of life" damages are recoverable,[668] as are damages for future pain and suffering, loss of consortium, and future earnings.[669]

B. Future Medical Care

Awards including an amount for future medical care are permissible.[670] Determining the amount to award in such cases is difficult. As one district court stated:

> In assessing damages in cases such as this, one of the most difficult tasks is arriving at a fair and just figure for future medical care. Ideally, the system would allow an open-ended award requiring the tortfeasor to provide the necessary care for . . . the rest of her life. Unfortunately, the law does not permit an award to be made in this fashion. Rather, the law requires that the trier of fact determine a claimant's life expectancy and award damages based on that determination. Inherent in such a system, of course, is the risk to each side. If [a plaintiff] dies before reaching . . . life expectancy, more is paid than is actually necessary. Conversely, if [the plaintiff] lives longer than expected, the tort-feasor is off without paying what should have been required. In proceeding on this issue, the hazards and potential injustices I have mentioned remain in my mind.[671]

Any such awards must be reduced to present cash value, however.[672] Structured settlements are also permissible under the Act.[673]

C. Medical Surveillance

No cases were found, other than as discussed, infra,[674] where courts required future medical surveillance. Several state law cases, in both state and federal courts, have considered such damages.[675] Since courts are required to follow the "law of the place," it is reasonable to assume that medical surveillance damages are recoverable under the FTCA. However, the statute and caselaw may preclude these awards as punitive.[676] Structured settlements providing a reversionary trust for medical expenses may be a partial answer.

D. Injunctive Relief

In Hatahley,[677] the district court enjoined federal agents from further interference with plaintiffs. The Supreme Court stated that "[s]ince the District Court did not possess the power to enjoin the United States, neither can it enjoin the individual agents of the United States over whom it never acquired personal jurisdiction."[678] That part of the court of appeals judgment dissolving the injunction was affirmed. Injunctive relief is not available.

IX. ANALYSIS OF SCENARIO CLAIMS

Any toxic tort situation is complex. The scenario presented is further complicated by the involvement of two federal agencies and the potential application of a remedial statute that was not designed to apply to "novel" and "unprecedented" liability. The following assumes that injured persons can prove causation[679] from

chemical contamination of their air, water and land due to activities at the Hawk site and Fox Field.

A. The Statute of Limitations

The medical malpractice discovery rule will probably apply. One justification for such a rule is the complexity of the subject matter. Medicine is a complex discipline, and laymen cannot be expected to be their own physicians. The relationship between contamination of soil, air and ground water by hazardous chemicals, its migration and impact on humans and animals is less understood and probably more complicated. Like medical malpractice, toxic torts may involve a long latency period for injury manifestation. Applying anything other than a discovery rule would be unreasonable. But the Supreme Court has not decided whether Kubrick applies outside of medical malpractice. If the Court answers this question negatively, the statute of limitations will be an almost insurmountable barrier for toxic tort claims.

1. Media Notice

Residents will likely be affected by the media notice decisions noted above. After the press unearthed the problems at Hawk, the subject was daily news at the local and national levels. Under some decisions, this form of notice may start the limitations clock running. Rural residents and Fox Field neighbors will be most affected. Military personnel and dependents may not have been as exposed to media coverage. Longtime civilian employees will no doubt be affected,

particularly by media coverage attending Fox Field's placement on the NPL.

2. Continuing Torts

Media notice will probably not preclude these claims entirely. The viability of continuing torts has been repeatedly confirmed. Damages may be limited, however, to those accruing within two years prior to filing their administrative claims.

B. Claimants

Nearby residents of the Hawk site and Fox Field are legitimate claimants. Hawk Trucking Company, as a third-party plaintiff, is not required to file an administrative claim.[680] The employee claims are far more complicated. Among other things, courts will have to determine whether injuries from exposure after work are distinct from work-related injuries.

1. Military Personnel and Dependents. The Feres doctrine bars claims by active duty military claimants regardless of whether the injuries were inflicted by military or civilian employees. Military claimants living on the installation are barred. But military members injured off duty by contamination off base may be more successful. Military reservists and national guardsmen are barred. The only potential remedy available is the VBA.

The scenario presents a potential challenge to Feres. Even if recreation, shopping or even atomic bomb testing are uniquely military, the connection is more tenuous when the injury is caused by negligently contaminated water supplies. Applying the Parker[681] test of status, situs and function to those who live and

work on base produces an interesting result. Though the first two prongs are met, the last is not. Providing safe drinking water is not uniquely military. Perhaps the courts will use FECA's "dual-capacity" doctrine to find that Feres does not apply.

Derivative claims by dependents are also barred from claims involving incident to service injuries to their military sponsors. Dependents may recover for their own injuries and their sponsors may recover derivatively. Retired personnel are generally not barred by Feres unless the injuries were inflicted due prior to discharge. They may have a cause of action if the government learned of their injuries after discharge and failed to warn.

2. Civilian Employees and Dependents. If these cases present a substantial coverage question under FECA, decision by the Secretary of Labor is required. If FECA applies, claims under the FTCA are barred. They may also be barred if FECA could apply but does not. Generally, FECA applies if there is a causal relation between job duties or conditions and the injuries involved. Some courts presume that injuries occurring on the employer's premises are work-related but others review all the circumstances. Derivative claims by an employee's dependents are excluded. Emotional distress claims are not. Civilian employees exposed at work and while living on base may have claims under both statutes. Providing uncontaminated drinking water to employees would seem to bear no direct relationship to employment and the "dual-capacity" rule may apply.

Claims by Hawk employees are not necessarily barred by the statutory employer defense. Waste disposal was probably not part of the business, trade or occupation of the Air Force, even though Fox Field previously disposed of its waste on base. Hawk would not be allowed indemnity or contribution for payments made to Feres barred claimants who sue Hawk separately but may recover for claimants covered by the FECA.

C. The Law of the Place

The FTCA is a procedural statute only. Federal law does not provide the "law of the place." Since some states have had environmental protection statutes in effect for years,[682] state tort theories may supply the substance for such claims. Federal laws and regulations may define the standard of care if state law provides an underlying duty. But if Berkovitz means that failing to perform mandatory federal duties is actionable in the absence of a state law analog, federal environmental laws will have a significant impact.

D. Contract or Tort?

This issue will impact only actions between the government and its contractors. It seems clear that these actions predominate in tort, rather than contract, and that Hawk's cross claim will not be dismissed as a contract claim.

E. Scope of Employment

The scenario presents few scope of employment issues. It appears that the employees who had knowledge of Hawk's waste commingling were acting only negligently. Generally, mere negligent deviation from the scope of employment is foreseeable

and the government remains liable. If the employees are identified thirty years later and sued individually, these employees will have to obtain DOJ certification of scope of employment. If there are criminal implications, certification will not be made. Numerous decisions hold that unforeseeable criminal acts are outside the scope of employment and the government is not liable.[683]

F. The Discretionary Function Exception

The discretionary function defense will impact the scenario claims. The Hawk site was, apparently, the only one available. If this is true, Fox Field personnel had few choices. If there were no other places on base for waste disposal, they could either cease operations or contract for disposal. If they considered and evaluated various alternatives within those two options, discretion was exercised. If other disposal sites were available but farther away and involved greater expense, discretion was exercised. But Hawk had no prior experience in waste disposal. Under one decision,[684] this fact may defeat application of the exception.

But as Berkovitz makes clear, the exception applies only to truly discretionary activities where choices are made. Subsequent actions are no longer automatically immune. Even if selection of Hawk is protected, the manner in which the government acted afterwards is not. Though the government had the contractual right to inspect, it had no obligation to do so. Hazardous waste disposal may be inherently dangerous activity imposing a non-delegable duty. Almost every theory of liability

possible on the scenario presented is potentially barred by the discretionary function exception.

G. The Standard of Care

The standard of care applicable to inspection, construction and operation of the Hawk site will be a difficult issue. Even if legal requirements are found showing how such sites were constrained, people in the waste disposal business in the 1950s probably had little knowledge of these requirements, awareness that toxic chemicals were environmentally damaging, or knowledge that chemicals dumped into the ground would eventually end up in a water supply. In medical malpractice actions, the standard of care is determined by reference to the manner in which other practitioners perform. Applying a similar standard to hazardous waste facilities seems appropriate.

H. The Contract as Evidence of Potential Torts

The contract provides fertile ground for litigation. It suggests both parties were aware they were dealing with dangerous materials. The "hold harmless" clause applied if the site was declared a public nuisance or a hazard to public health or wildlife. The "Safety Precautions" clause required compliance with applicable laws and defined what the parties contemplated as a "dangerous material."

These facts suggest several potential liability theories. Failure to inspect the site of contract performance is generally not actionable. If state law considers hazardous waste disposal inherently dangerous activity, the duty to inspect may be non-delegable, making the government liable for the contractor's

failure to properly perform. In addition, the government may be liable for failing to supervise contractor activities, particularly since employees knew Hawk was not segregating wastes.

Since Hawk Trucking Company had no prior experience with hazardous waste disposal, the government may also be liable for negligent selection. Even though contract awards are generally discretionary, this contract was awarded to an inexperienced contractor for an inherently dangerous activity. If the government considered several alternative sites, weighed alternatives and conducted a cost-benefit analysis, it may prevail on a discretionary function argument.

The government's failure to inspect, with or without knowledge of waste commingling, may violate state law standards for abnormally dangerous or hazardous activities. Failure to act after knowledge of the commingling may be considered likewise. If low level employees were unaware of the requirement to separate wastes, the government failed to properly supervise or train its employees. If these employees were active duty military personnel, courts will not inquire into the military's decision-making process. If future decisions consider whether the activity is "uniquely military in nature," the result may be different: there is nothing peculiarly military about hazardous waste disposal. If the employees are civilians, courts may be more inclined to inquire.

I. Other Facts and Potential Theories of Liability

There are several potential failure to warn arguments. The two most obvious involve the release of excess water into Rural and EPA's two year delay in informing residents that the water supply was contaminated. Both may be protected by the discretionary function and misrepresentation exceptions.

The initial emergency decision not to warn or evacuate is probably protected by both exceptions. Continued failure to warn about a creek containing acidic solutions should be actionable as a tort independent from simple misrepresentation. EPA is chartered to protect the public health; common law negligence theories should suffice. The Good Samaritan doctrine may also apply: EPA's failure to exercise reasonable care may have significantly increased the risk of harm. If the agency considered whether to warn or evacuate and made a decision based upon considering alternatives, risks or costs, the discretionary function exception may apply. For example, if the downstream gradient was severe and EPA felt that the release would clear the area quickly, or that the hazard was slight, it exercised discretion. If it did not actually make a decision, however, the exception should not apply.

The second failure is probably protected by the discretionary function exception. EPA would simply have to show that during the period of delay, it considered various alternatives, how to best protect the public health, and evaluated the risks of past and continued exposure. This conduct may also be protected by the misrepresentation exception, unless

claimants' show a tort theory not dependent on failure to communicate. This requirement may be satisfied by a state law duty to protect the public from exposure to contaminated drinking water supplies. The Good Samaritan doctrine may also apply for the reason noted above.

Plaintiffs may recover for negligent infliction of emotional distress but intentional infliction theories are not actionable in all jurisdictions. Their claims for battery are expressly excluded unless they show that independent negligent or wrongful conduct resulted in a foreseeable battery preventable by the exercise of reasonable care.

Conversion, trespass and nuisance theories may apply. Since conversion involves an interference with possession of personal property, this theory may not arise under the scenario. Trespass theories are generally actionable. Nuisance claims may not succeed due to this theory's overtones of liability without fault. Strict liability theories do not apply. Plaintiffs' real property claims may constitute constitutional claims for "takings" which are not actionable under the FTCA.

J. Damages

Claimants can recover compensatory damages as provided under state law. Damages for physical injuries, medical costs, the cost of alternative water supplies, loss of income, and damage to personal property are recoverable. Continued medical surveillance, though appropriate and available in some states, is an unsettled issue. As a matter of federal law, punitive damages, pre-judgment interest and attorneys' fees are not.

X. ANALYSIS OF SELECTED ENVIRONMENTAL CASES UNDER THE FTCA

A surprising number of courts have faced cases involving environmental issues and the FTCA. Not surprisingly, judges, lawyers and clients have had significant difficulties with the complex procedural and jurisdictional requirements.

A. The Statute of Limitations

For example, in New York v. United States[685] the state brought suit due to chemical contamination caused by a former Air Force base. The groundwater was polluted by jet fuel discharges that occurred over approximately twenty years. The state submitted an administrative claim which was denied. Suit was filed over a year later. The claim was barred "[s]ince it is well established that the six month period to file suit after a denial of an administrative claim is jurisdictional . . . plaintiff's failure to comply with this requirement precludes this court from invoking subject matter jurisdiction of this case through the FTCA".[686]

B. Contract or Tort?

In American Lifestyle Homes, Inc. v. United States,[687] the plaintiff alleged that EPA wrongfully converted its mobile home. EPA took custody of the home as part of a CERCLA cleanup of dioxin contamination but failed to return it on time as promised. The district court transferred the case to the Claims Court as a breach of contract action, not a tort. The Claims Court disagreed and sent the case back.

C. Failure to Warn, Misrepresentation and the Discretionary Function

In **Wells v. United States**,[688] residents alleged that EPA knew of toxic lead pollution in their area, that it was a public health risk, and failed to either correct the problem or require clean up. They claimedd EPA had known of elevated blood levels in school children, wrongfully concealed this information from the public, and failed to perform its statutory duty to approve or disapprove a state implementation plan for lead clean-up as required by the Clean Air Act.[689] The government moved to dismiss for failure to state a claim.

The court first reviewed the question of whether the complaint alleged viable causes of action under the "law of the place." It acknowledged the general rule that "a violation of a duty imposed by federal statute without more, does not give rise to a cause or action under the FTCA."[690] Plaintiffs responded by challenging EPA's conduct under the Good Samaritan doctrine.[691] The discretionary function and misrepresentation exceptions applied. As to the first, the court noted that:

> EPA's authority to enforce environmental standards generally, or to respond to a particular environmental problem as it arises, did not require the agency to warn residents of local toxic pollution or to have those wastes removed. Congress has left EPA to decide the manner and the extent to which it will protect individuals from exposure to hazardous wastes. Such decisions represent the exercise of "discretionary regulatory authority of the most basic kind . . . and, hence, do not give rise to liability under the FTCA.[692]

As to the second, the court noted that:

> Moreover, because plaintiffs' misrepresentation claim is so closely tied to their other allegations, it

> would be anomalous to hold that a claim may be brought for misinforming persons about the lead pollution problem, but not for mishandling the problem in other respects. Rather, plaintiffs' entire cause of action stems from an activity that Congress believed should not be scrutinized by the medium of a tort action for damages.[693]

The Seventh Circuit reached a similar conclusion in **Cisco v. United States**,[694] another case involving dioxin contamination and EPA's failure to warn. Relying on **Varig Airlines**, the court held the claim was barred:

> In deciding not to warn Cisco about the contaminated landfill and in deciding not to remove the contaminated dirt from the landfill, the EPA made political, social and economic judgments pursuant to its grant of authority. Cisco may not challenge those judgments under the FTCA because they fall within the discretionary function . . . .[695]

Since the exception applied, it was unnecessary to reach plaintiffs' arguments on the Good Samaritan theory or the misrepresentation exception. The Eighth Circuit applied similar reasoning in a case involving road workers in Times Beach, Missouri, who alleged injuries resulting from EPA's failure to warn of dioxin contamination.[696] One district court decided likewise in a case involving failure to warn of polychlorinated biphenyl (PCB) contamination.[697]

But in **Dube v. Pittsburgh Corning**,[698] the First Circuit held the discretionary function exception inapplicable where the government knew of a safety hazard and failed to warn. This case involved a shipyard worker's daughter who died from chronic exposure to asbestos. The daughter received exposure from her father's clothes.[699] The government was negligent in its operation of the shipyard and this negligence was the proximate

cause of her death. But the claim was barred by the discretionary function exception.

The court of appeals reversed. The Navy knew about the risk and developed safety requirements for workers. The Navy had not considered or made a decision about whether to warn bystanders. No choice was made and there was no exercise of judgment despite this knowledge. This was not the type of conduct the exception was designed to protect.[700]

In Starrett v. United States,[701] the Ninth Circuit held the discretionary function exception did not bar plaintiffs' claim that the Navy polluted their wells. The source of contamination was a demilling process to remove explosives from missiles. Missile heads were steamed, waste water was collected, passed through cheesecloth, pumped into a sump and then out into a ditch.

Plaintiffs argued that since the Navy was required to comply with four different regulations regarding waste disposal,[702] the exception did not apply. The court found a duty in an Executive Order which mandated secondary treatment standards for all facilities constructed after its effective date.[703] The district court's decision was reversed and remanded to determine if the Navy met this standard.

In Garland v. Burn Indus. Inc.,[704] the Fifth Circuit applied the misrepresentation exception to EPA activities in analyzing, testing and approving a physical-chemical waste water treatment process. The district court found that EPA's activities were

discretionary. The court of appeals reviewed the Neustadt decision and the Clean Water Act[705] and concluded as follows:

> We therefore find that the applicable regulations of the Clean Water Act imposed no duty on the EPA to warrant to Garland that its plant would meet its permit requirements, which would suspend application of the misrepresentation exception.
>
> In addition, to the extent that [this was a] claim for contribution on inaccurate data or test results the EPA furnished to Garland or to it as Garland's agent, this claim is clearly barred by the misrepresentation exception . . . .[706]

Another court stated that EPA actions under CERCLA:

> . . . in determining which sites to place on the priority list and choosing appropriate cleanup, containment and removal methods, is the type of conduct Congress intended to shield from tort liability. Although the legislation provides a "blueprint" for the EPA to follow in applying CERCLA, EPA employees must necessarily make policy determinations in establishing the plans, specifications and schedules pertaining to the implementation of CERCLA. Clearly, Congress entrusted the management of cleaning up hazardous waste sites to EPA discretion by setting forth guidelines within which the EPA must act, but leaving implementation of the program to the discretion of the EPA.[707]

A more recent decision held that an On Scene Coordinator's (OSC) selection of a removal action[708] and its timing were discretionary acts. In United States Fidelity & Guar. Co. v. United States,[709] the OSC contracted for clean up of an abandoned waste site. One of the most dangerous hazards was an old railroad tank car resting on raised concrete pedestals. It contained oleum, a solution of sodium trioxide in concentrated sulfuric acid, which is extremely reactive and sensitive to moisture. The site was near a town of 15,000, so the contractor initially proposed moving the car away before neutralizing the

oleum. The OSC disapproved due to potential risks of transportation.

The next solution was to neutralize the oleum in a controlled water drip. This was approved though the OSC was warned that the operation should occur only on sunny days with a wind blowing away from town. While the oleum was being drained, a valve nut came loose. A dense toxic cloud formed, migrated toward town and five people suffered respiratory distress. After this accident, the OSC met with the contractor and decided to continue the operation.

Eight days later, the valve was clogged. Contractor employees tried to clean it, but a steam explosion occurred. Another toxic cloud migrated into town causing property damage to 500 automobiles, an airplane and several buildings. On both occasions, the winds were blowing into--rather than away from--the town. The district court found the government liable for not taking wind conditions into account.[710]

The Third Circuit reversed. The discretionary function exception applied:

> The objective of this phase of the CERCLA program is to protect the public from the dangers of abandoned toxic waste. Execution of that program and accomplishment of its objective necessarily require the setting of priorities in light of the risks presented at various sites and the finite resources available to address the problem. In this instance, the EPA classified the cleanup operation at the Drake site as an "immediate removal action." The agency thus determined that significant risks would attend a delayed cleanup.[711]

The court reviewed the concerns faced by the OSC in determining how best to proceed with cleanup:

> With this hazard identified and this priority fixed, the [OSC] was dispatched with authority to determine how to schedule the cleanup operations . . . in a manner that would most safely and effectively minimize the risk of serious injury to the public. In particular, the [OSC] faced the problem of when to schedule the neutralization of an oleum tank that was venting directly into the atmosphere and posed a major threat of fire, explosion, and release of pollutants into the air. In this context, one would expect the scheduling decision to reflect not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutralization on the day chosen against the risks of further delay. Thus the authority delegated to the [OSC] left room for, and indeed required, the exercise of policy judgment based upon the resources available and the relative risks to the public health and safety from alternative actions.[712]

D. Negligent Selection or Supervision

1. Of Employees

In K.W. Thompson Tool Co. v. United States,[713] plaintiff (KWT) brought suit alleging that it was wrongfully prosecuted for violating environmental laws.[714] KWT claimed EPA had violated its own policy by prosecuting while voluntary compliance efforts were occurring, that EPA made technical and scientific errors in issuing and setting the standards for plaintiff's NPDES[715] permit, and various breaches of EPA's duty to train and supervise subordinate employees.

The court characterized the prosecutorial decision as discretionary. Plaintiff also argued that the EPA's application of technical and scientific methodology in the permitting process was not discretionary because Congress had mandated that EPA be the expert. The court rejected this argument because "the fact that Congress entrusted the formulation of national environmental

standards to the EPA instead of to the courts confirms that the setting of these standards comes within the discretionary function exception."[716] Since plaintiff's failure to train and supervise arguments were predicated on these activities, the court stated that "if the Court determines that plaintiff may not proceed with these substantive claims, then the failure of certain individuals to properly train and supervise their subordinates so as to allow the disputed conduct to occur would not independently state a claim."[717] The First Circuit affirmed.[718]

2. Of Contractors

In **Smalls v. United States**,[719] plaintiffs sought damages arising out of an EPA contractor's activities. The contract required transportation of hazardous waste to specified permitted facilities. Instead, the contractor deposited the wastes in a landfill near plaintiffs' homes. Plaintiffs claimed that the soil, water and air surrounding the landfill were contaminated and that they suffered diminished property values as a result. The government filed a motion a dismiss. Plaintiffs responded by alleging that EPA negligently selected and supervised the contractor. The district court cited **Varig Airlines** and the Third Circuit's decision in **Berkovitz**[720] and held these claims were barred.

The Third Circuit reversed.[721] Its decision in **Berkovitz** was predicated on the conclusion that "an agency's promulgation of a regulation specifying standards governing a matter subject to regulation does not without more make the discretionary function

exception inapplicable."[722] This was the basis for the district court's dismissal. Since the circuit's decision in Berkovitz was reversed on appeal, it had little choice but to reverse:

> The [Supreme Court's decision in Berkovitz] . . . negated the proposition upon which the district court premised its decision, namely, that the EPA was immunized from liability by the discretionary function exception for any damages that resulted from the agency's failure to adhere to the state guidelines for waste disposal.[723]

In Dickerson, Inc. v. Holloway,[724] the district court held that the government could be held liable for failing to supervise a contractor's performance of a PCB disposal contract. The discretionary function exception did not apply. State law imposed a non-delegable duty on a contractor's employer to ensure that abnormally dangerous activities were carried out in an non-negligent fashion. The court found that:

> Moreover, environmental statutes and regulations place an affirmative duty on the government, as producer of PCBs, to ensure safe disposal of PCB waste from cradle-to-grave. . . . CERCLA authorizes state and federal governments to institute actions against responsible parties for the containment, cleanup, and removal of hazardous wastes. . . . Responsible parties include generators of hazardous waste who contract for its disposal. . . .
>
> Likewise, TSCA and the PCB Regulations provide specific rules for the proper disposal of PCB waste. . . . TSCA additionally imposes direct liability on the government for violation of its provisions . . .
> . . . .
> For the foregoing reasons, we therefore conclude that the government is under a statutory duty to ensure proper disposal of PCBs according to a fixed and ascertainable standard. It must carry out this duty at the operational level. Thus, the acts challenged in the instant case are not of the nature and quality that Congress intended to shield from tort liability, and therefore do no fall within the discretionary function exception to the FTCA's general waiver of sovereign immunity.[725]

This decision was affirmed on appeal.[726]

E. Emotional Distress and Damages

In Clark v. United States,[727] plaintiffs were residents of property adjoining an Air Force base. For several years, wastes were disposed of in landfills and burn pits on the base golf course. In 1983, plaintiffs discovered their well water was contaminated and were advised not to use it. The chemicals found included trichloroethylene (TCE) and a derivative, 1,2 trans dichloroethylene (DCE). Samples taken over the next two and a half years showed varying levels of contamination and significant concentrations of iron. EPA's recommended contamination level for TCE, a probable human carcinogen, was zero.

The government stipulated the chemicals originated from the base, though preliminary investigations were inconclusive. The court said although the exact nature of the danger posed by TCE was not precisely known, it was generally known in the 1950s that TCE should not be in a water supply. And the court went further:

> Prior to 1950, it was common knowledge that groundwater could be polluted and that the pollution could travel great distances from the site of the original contamination. Further, it was generally known prior to that time that percolation, a process by which substances disposed of would leach into the underlying groundwater, could occur and that groundwater needed to be protected from deleterious leachates.
>
> The appropriate standard of care in waste disposal in the 1950s was to treat TCE as a hazardous substance in disposing of the contaminant so as not to pollute groundwater.[728]

The court reviewed several technical manuals, some dating as early as 1946, mandating that disposal siting decisions consider

the effect on groundwater. These manuals indicated it was Air Force policy to avoid groundwater contamination.[729] Nonetheless, wastes were not segregated, the site was not inspected, there were no special precautions or instructions to persons hauling waste, and record-keeping was poor.[730]

The court found that the Air Force knew or should have known that its disposal practices could result in groundwater contamination, that plaintiffs' wells were contaminated as a result, and that these practices deviated from the standard of care applicable in the 1950s and 1960s[731]. Though plaintiffs had not shown common law negligence, the Air Force violated state laws and these violations proximately caused the injuries. Plaintiffs did not prove trespass or nuisance.[732] Even if the initial decision to use landfills and burn pits was discretionary, the manner in which they were sited and operated was not. The government was "negligent per se."

Plaintiffs sought damages for diminution in the value of their property, reduction in rental income, plumbing damage, the cost of bottled water, pain and suffering caused by injuries received when hauling bottled water, inconvenience, and emotional distress due to consumption of contaminated water. The court awarded damages for all but the physical injuries. In addition, the court stated that:

> This litigation did not consider possible future medical conditions of Plaintiffs. Therefore, if any plaintiff develops a future medical condition involving physical injury proximately caused by his or her exposure to any contaminants disposed of at McChord, said plaintiff should not be prevented from suing defendant for damages resulting from the medical

condition, and his or her claims are not barred by this action.[733]

XI. CONCLUSION

There is nothing uniquely federal, governmental or military about hazardous waste disposal, management or transportation, or about providing uncontaminated drinking water. There is also nothing about these activities peculiarly related to federal employment. In the past, citizens rarely questioned if drinking water was safe. When they learn that federal, state and local governmental entities and private parties polluted their water supplies, citizens become justifiably upset and seek an outlet for their outrage, fear and losses. By itself, the FTCA is not that viable an outlet.

In the scenario, there are numerous potentially injured individuals and almost as many potentially responsible parties.[734] There are almost as many remedial hurdles to recovery. But there is only one, common injury.

This paper has considered only the possibilities for recovery from the federal government under the FTCA. Like other limited waivers of sovereign immunity, the Act is construed strictly against extending governmental liability beyond the clear terms of the statute. Its procedural and substantive limitations are legion, though not insurmountable. Perhaps most significant is the fact that the Supreme Court recently restricted district court jurisdiction for other related claims.[735] Consequently, injured parties must file lawsuits in

both state and federal courts using a variety of statutory and common law actions in order to obtain complete recovery against all responsible parties.

This exacerbates the inconsistencies faced by various classes of claimants under the FTCA. As Justice Scalia noted, one fact pattern may create numerous, inconsistent recovery possibilities based on the claimant's status:

> A serviceman is told by his superior officer to deliver some papers to the United States Courthouse. As he nears his destination, a wheel on his government vehicle breaks, causing the vehicle to injure him, his daughter (whose class happens to be touring the Courthouse that day) and a United States marshal on duty.[736]

Applying current caselaw, Justice Scalia noted that:

> . . . the serviceman may not sue the Government (**Feres**);
>
> the guard may not sue the Government [FECA];
>
> the daughter may not sue the Government for the loss of her father's companionship (**Feres**),
>
> but may sue the Government for her own injuries (FTCA).
>
> The serviceman and the guard may sue the manufacturer of the vehicle, as may the daughter, both for her own injuries and for the loss of her father's companionship.
>
> The manufacturer may assert contributory negligence as a defense in any of the suits. Moreover, the manufacturer may implead the Government in the daughter's suit . . . and in the guard's suit . . . even though the guard was compensated under a statute that contains an exclusivity provision (FECA). But the manufacturer may not implead the Government in the serviceman's suit, even though the serviceman was compensated under a statute that does not contain an exclusivity provision.[737]

In addition, notwithstanding the fact that claimants did nothing to precipitate, aggravate or contribute to their plight,

they must prove someone else was legally at fault in order to recover--if they clear significant legal procedural obstacles under a variety of systems. This seems hardly acceptable, particularly when they must bear their own legal costs. This suggests the need for a tort medium, perhaps akin to Superfund, in which all injured plaintiffs may recover in one court from all responsible parties "swift, certain relief, thus avoiding the expense, effort and delay of litigation."[738] Superfund's no-fault concept should apply to personal injuries as well as to environmental damage.

The probability for recovery under the FTCA is not that good. First, the prospect for mass claims is not promising. Though such claims are theoretically possible, the administrative claims requirement is a substantial deterrent.[739] Second, the statute of limitations poses a significant problem for injuries with long latency periods: even if a discovery rule applies, damages may be limited to those occurring within the two years immediately preceding filing. Third, the requirement for fault, even assuming that jurisdictional bars are inapplicable, is potentially insurmountable given that the applicable standard of care will be difficult to prove and may not have been violated. Fourth, jurisdictional bars such as the discretionary function and misrepresentation exceptions may apply. Fifth, to the extent that inappropriate conduct by government employees is considered criminal, it may be outside the scope of employment, relegating injured plaintiffs to recovery from the personal assets of particular employees, if they can be identified. Sixth, if

plaintiffs prevail they must also prove their damages with certainty to overcome the "punitive damages" rule. Even though the full extent of plaintiffs' injuries will not be known at trial, district courts are required to reduce awards in excess of actual pecuniary losses as punitive.

Analysis of toxic tort claims under the FTCA must begin not with a review of potential liability theories but with full understanding and appreciation for activities that are not actionable. This type of claim was not contemplated by Congress when it considered and enacted this statute. As Justice Reed noted in Dalehite, Congress was concerned about "ordinary" torts like motor vehicle accidents. As a result, the Act is not that amenable to complex claims. Its jurisdictional bars are rigid and omnipresent. Understanding and applying them is crucial to the outcome. Once they are understood, practitioners may then proceed to select potential liability theories.

The Supreme Court decisions in Feres and Dalehite indicated that the Act wasn't intended to apply to novel and unprecedented liabilities.[740] Toxic tort claims, though involving more or less traditional theories, would seemingly have qualified in 1950 as "novel or unprecedented." Ironically, the problems involved in many environmental cases were caused by actions taken in the 1950s when the Supreme Court used this very language.

Justice Jackson, in his dissenting opinion in Dalehite, squarely addressed the problems caused by restricting the Act to "ordinary" torts. Though written in another context, this analysis is equally applicable to mass toxic tort claims. And

even though this language was written over forty years ago, it plainly demonstrated the shortsightedness of the Dalehite decision and foretold the difficulties plaintiffs would face in pursuing such "novel" or "unprecedented" actions as toxic tort claims under the FTCA:

> Where there are no specific state decisions on the point, federal judges may turn to the general doctrines of accepted state tort law, whence state judges derive their governing principles in novel cases. We believe that whatever the source to which we look for the law of this case, if the source is as modern as the case itself, it supports the exaction of a higher degree of care than possibly can be found to have been exercised here.
>
> We believe it is the better view that whoever puts into circulation in commerce a product that is known or even suspected of being potentially inflammable or explosive is under an obligation to know his own product and to ascertain what forces he is turning loose. If, as often will be the case, a dangerous product is also a useful one, he is under a strict duty to follow each step of its distribution with warning of its dangers and with information and directions to keep those dangers at a minimum.
>
> It is obvious that the Court's only choice is to hold the Government's liability to be nothing or very heavy, indeed. But the magnitude of the potential liability is due to the enormity of the disaster and the multitude of its victims. The size of the catastrophe does not excuse liability but, on its face, eloquently pleads that it could not have resulted from any prudently operated Government project, and that injury so sudden and sweeping should not lie where it has fallen. It should at least raise immediate doubts whether this is one of those "discretionary" operations Congress sought to immunize from liability.[741]

XII. FOOTNOTES

1. **See generally**, L. Jayson, **Handling Federal Tort Claims**, Vol. I, Chapter 2 (1987); Indian Towing Co. v. United States, 350 U.S. 61, 68-69 (1955).

2. 28 U.S.C.A. §2680 (West 1965 & Supp. 1989).

3. 28 U.S.C.A. §1346(b) (West 1976); 28 U.S.C. §2674 (West 1965 & Supp. 1989).

4. 28 U.S.C.A. §2675(a) (West 1976 & Supp. 1989); United States v. Yellow Cab Co., 340 U.S. 543 (1951); Keene Corp. v. United States, 700 F.2d 836, 842 (2nd Cir. 1983), **cert. denied**, 464 U.S. 864 (1983).

5. For an analysis of the administrative claims requirement and a condensed version of Section III.A., **infra**, **see**, S. Stubblebine, **Mass Toxic Claims Under the Federal Tort Claims Act**, Fed. Bar News & J., Vol.35, No.7, p.328 (Sept 1988).

6. 28 U.S.C.A. §2401(b) (West 1978 & Supp. 1989).

7. 28 U.S.C.A. §2675 (West 1976 & Supp. 1989); Douglas v. United States, 658 F.2d 455, 459-60 (6th Cir. 1981); Caton v. United States, 495 F.2d 635, 638 (9th Cir. 1974); Cooper v. United States, 442 F.2d 908 (7th Cir. 1981).

8. 28 U.S.C.A. §2401(b) (West 1978 & Supp. 1989); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984).

9. 28 U.S.C.A. §2401(b) (West 1978 & Supp. 1989).

10. **Id.**; 28 C.F.R. §14.2(a) (1988).

11. 28 C.F.R. §14.2(a) (1988); Bialowas v. United States, 443 F.2d 1047 (3rd Cir. 1971)

12. 28 C.F.R. §14.2(a) (1988).

13. **Id.**; Erxleben v. United States, 668 F.2d 268, 271-73 (7th Cir. 1981); Caton, 495 F.2d at 638.

14. **See, e.g.**, Henderson v. United States, 785 F.2d 121 (4th Cir. 1986).

15. 28 U.S.C.A. §2679(d)(5)(B) (West Supp. 1989).

16. 28 U.S.C.A. §2402 (West 1978).

17. 28 U.S.C.A. §2675(b) (West 1976 & Supp. 1989).

18. 340 U.S. 135 (1950).

19. 346 U.S. 15 (1953).

20. 350 U.S. 61 (1955).

21. 42 U.S.C.A. §9613(k)(2)(D) (West Supp. 1989).

22. 42 U.S.C.A. §9605(a)(8)(A),(B) (West 1983 & Supp. 1989).

23. 42 U.S.C.A. §9601 et seq. (West 1983 & Supp. 1989).

24. The "intentional torts" exception, 28 U.S.C. §2680(h), is not addressed separately. Individual intentional torts are discussed in various sections as these issues become relevant. The two most relevant are the exceptions for assault and battery and misrepresentation. **See discussion infra** pp. 51 and 84.

25. 444 U.S. 111 (1979).

26. **Compare** the district court's characterization, 435 F.Supp. 166 at 170 **with** that of the Supreme Court, 444 U.S. at 115.

27. Regarding the administrative claims process, **see** 444 U.S. at 115 n.4.

28. 435 F.Supp. 166 (1977).

29. 481 F.2d 1092 (1978).

30. The Court noted that:

> The Court of Appeals relied on three federal cases, all decided within the past five years, that held or indicated in dictum that a malpractice plaintiff . . . must know the legal ramifications of the facts, as well as the facts themselves, before the limitations period will begin to run . . . .
>
> Contrary to the implications of the dissent, the prevailing rule under the Act has not been to postpone the running of the limitations period in malpractice cases until the plaintiff is aware that he has been legally wronged. Holding such as the one before us now are departures from the general rule . . . .

444 U.S. at 123 n.8, **citing** Bridgford v. United States, 550 F.2d 978 (4th Cir. 1977); DeWitt v. United States, 593 F.2d 276 (7th Cir. 1977); Exnicious v. United States, 563 F.2d 418 (10th Cir. 1977); Jordan v. United States, 503 F.2d 620 (6th Cir. 1974).

31. In re Swine Flu Prods. Liab. Litig., 764 F.2d 637 (9th Cir. 1985).

32. 444 U.S. at 124.

33. The often quoted language follows:

> A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims . . . .

Id. at 123.

34. Portis v. United States, 307 F.2d 670 (4th Cir. 1973). Note the district court's comment about this in Kubrick, 435 F.Supp. at 181 n.20. Leslie Portis was hospitalized for corrective bowel surgery. She was given neomycin and nearly died. Leslie recovered but her parents were advised to check her hearing at age three. Subsequently, Leslie developed respiratory and ear problems. By 1968, the family knew she had a hearing problem, "a fact first suspected by her mother in 1964 and confirmed by the age-three hearing test." The court described the critical facts regarding knowledge:

> In an attempt to improve her hearing, Leslie underwent extensive examination and treating during the next five years [from 1964 to 1969]. During this entire time, however, none of the physicians who examined and treated Leslie (there were about seven) diagnosed the cause of the hearing loss. Mrs. Portis was told that deafness could have been caused by ear infections, high fever, or the Neomycin injections. It was not until 1969 that a doctor finally diagnosed Leslie's problem as a profound neurosensory hearing loss related to Neomycin toxicity.

307 F.2d at 671. The Fifth Circuit concluded the claim was not barred because the statute did not start to run until 1969. The court stated that:

> [T]he unknown factor that delayed instituting this lawsuit was not the nature and extent of Leslie's injury . . . but rather what caused it. . . Even if the colonel knew that there was a "distinct possibility" of a causal relationship, knowledge and testimony to that effect is scarcely enough to go to the finder of fact on the question of causation.

307 F.2d at 673. What makes the distinction between Portis' "distinct possibility" and Kubrick's "highly likely" or "highly possible" even more difficult to comprehend is that Portis was a graduate nurse while Kubrick was a machinist with a high school education. Furthermore, Kubrick was diligently maintaining a VA

claim at the time and kept getting the same response from VA physicians, despite the fact that:

> . . . the medical literature as of April 1968 contained sufficient and sufficiently widespread information as to the ototoxicity and absorption properties of neomycin to have warned [the treating physician] of the dangerousness and hence the impropriety of his treatment.

444 U.S. at 122 n.9, quoting 435 F.Supp. at 177 n.10. The Portis decision doesn't discuss diligence but Mrs Portis was medically trained, suspected a hearing loss in 1964, knew of the life threatening neomycin episode, and knew that the drug was one of three potential causes, yet the family didn't initiate any investigation.

35. 581 F.2d at 1096; 435 F.Supp. at 181 n.20. Kubrick's "lack of diligence" appears far more reasonable and less contributory than the Portis' rather benign neglect. If the Supreme Court had tried to distinguish these cases, any distinction is plainly in Kubrick's favor.

36. 337 U.S. 163 (1949). This rule was first applied in Quinton v. United States, 304 F.2d 234 (5th Cir. 1962).

37. 45 U.S.C.A. §§51 et seq. (West 1986).

38. See, e.g., Zeleznik v. United States, 770 F.2d 20, 23 (3rd Cir. 1985); In re Swine Flu, 764 F.2d at 639; Steele v. United States, 599 F.2d 823, 828 (7th Cir. 1979); Quinton, 304 F.2d at 239.

39. The Court's language follows:

> [M]echanical analysis of the "accrual" of petitioner's injury--whether breath by breath, or at one unrecorded moment in the progress of the disease--can only serve to thwart the congressional purpose.
>
> [This] would mean that at some past moment in time, unknown and inherently unknowable even in retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view, Urie's failure to diagnose . . . a disease whose symptoms had not yet obtruded upon his consciousness would constitute waiver of his right to compensation
> . . . .
>
> We do not think the humane legislative plan intended such consequences to attach to blameless ignorance . . .
> . .

337 U.S. at 169-70 (emphasis added).

40. 444 U.S. at 120 n.60.

41. **See, e.g.**, Gen. Elec. Co. v. United States, 792 F.2d 107 (8th Cir. 1986); Gibson v. United States, 781 F.2d 1334 (9th Cir. 1986); **Zeleznik**, 770 F.2d at 22-24; DuBose v. Kan. City S. Ry., 729 F.2d 1026, 1029-32 (5th Cir. 1984) (applying **Kubrick** in an FELA action); Barrett v. United States, 689 F.2d 324, 327-30 (2nd. Cir. 1982); Ware v. United States, 626 F.2d 1278 (5th Cir. 1980); Stoleson v. United States, 629 F.2d 1265, 1268-71 (7th Cir. 1980); Liuzzo v. United States, 485 F.Supp. 1274, 1280-84 (E.D.Mich. 1980); Socialist Workers Party v. United States, 642 F.Supp. 1357, 1411-12 (S.D.N.Y. 1986).

42. 629 F.2d 1265.

43. **Id.** at 1267.

44. This review may have been somewhat painful as well since the circuit had decided one of the aberrant discovery rule cases that was expressly rejected in **Kubrick**. **See Dewitt**, 593 F.2d 276, **rev'd on rehearing in light of Kubrick**, 618 F.2d 114 (1980).

45. 629 F.2d at 1269 (emphasis added).

46. **Id.** at 1270.

47. Despite the court's protestations to the contrary, this appears to be precisely the kind of case that such statutes are designed to protect against. At least the court appreciated the ramifications of its decision:

> We recognize that at first blush this holding appears to burden defendants indefinetly with the risk that they may be called upon to answer for some long-forgotten conduct that medical science recognizes only years later to be harmful. Concededly, if medical science had not recognized the causal relation . . . until the year 2000, the statute of limitations would not commence to run until that later date. Although this appears to undermine the policy inherent in section 2401(b) . . . postponement will only burden defendants in cases like this where they have breached a preexisting duty.

629 F.2d at 1271. The preexisting duty distinction here seems more apparent than real--the court is referring to the trial court's finding that Stoleson's employer failed to comply with Army regulations (which were framed in a directory--not mandatory--fashion) but expressly noted that the propriety of the trial court's decision on that issue wasn't before the court for review. The opinion concluded with:

> Furthermore, the competent medical opinions she so diligently sought, including that of [her employer's]

physician, dissuaded her from presenting a futile claim. She is not the kind of plaintiff nor is this the kind of case that a statute of repose . . . or the Kubrick decision seek to protect against.

629 F.2d at 1271. The court seemed preoccupied with the "legal ramifications" argument it lost in Kubrick:

> But since medical science did not then recognize the causal connection, she was powerless to pursue the matter through legal channels . . . the suggestion that Mrs. Stoleson had a claim she could judicially enforce is implausible.

629 F.2d at 1270 (emphasis added).

48. One court said that:

> Kubrick, this court believes, signals an end to the categorical approach to the statute of limitations, and teaches that the facts in each case must be thoroughly examined to determine when the plaintiff had knowledge of the "critical facts". . . .[This] rationale . . . is broad enough to warrant, indeed compel, its application to a nonmalpractice case if the plaintiff . . . is ignorant of the critical facts concerning his injury.

Liuzzo, 485 F.Supp. at 1281.

49. Id. at 1274.

50. Id. at 1283.

51. Id. at 1283. Compare "injury and its cause" with "that he has been hurt and who has inflicted the injury." 444 U.S. at 120, 122.

52. 764 F.2d 637.

53. Barrett, 689 F.2d 324.

54. Dyniewicz, 742 F.2d 484. However, it is impossible to determine from this opinion--since it failed to mention when the bodies of plaintiff's parents were found--whether or not the discovery rule was really applied. If that date was later than the accident, then the discovery rule was applied. If the dates of injury and discovery were the same, the result is no different than automobile injury cases where knowledge of the injury is simultaneous with its cause.

55. Zelesnik, 770 F.2d 20.

56. DuBose, 729 F.2d 1026.

57. **Socialist Workers Party**, 642 F.Supp. 1357.

58. **Gibson**, 781 F.2d 1278.

59. **Ware**, 626 F.2d 1278.

60. **Gen. Elec. Co.**, 792 F.2d 107.

61. The Court discussed such cases as follows:

> Nor can we accept the theory that each intake of dusty breath is a fresh "cause of action." In the present case, for example, application of such a rule would, arguably limit petitioner's damages to that aggravation of his progressive injury traceable to the last eighteen months of his employment.

337 U.S. at 170.

62. Cole v. United States, 755 F.2d 873, at 876 (1985): "This 'continuing tort' theory was also rejected in Stanley v. Cent. Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981)." However, Cole and the cases it cited involved injuries suffered incident to military service and alleged a governmental failure to warn, a duty that continued after discharge. This was an obvious but unsuccessful attempt to end-run the **Feres** rule.

63. **Lemaire** v. United States, 76 F.Supp. 498 (D.Mass. 1948)

64. 643 F.Supp. 1072 (E.D.N.Y. 1986).

65. **Id.** at 1079.

66. **Id.** (citation omitted).

67. **Gross** v. United States, 676 F.2d 295, 300 (1982) citing **Cooper**, 442 F.2d 908, 911-12, a case which found no continuing tort but noted that:

> It is true that the statute of limitations does not always begin at the first moment where a wrongful invasion of a protected interest might give rise to a cause of action. In such cases, the specific circumstances of the case may lead the court to suspend operation of the statute and effectively tolls its passage by postponing or continuing its inception . . . In certain instances, the critical date is the point at which the injury becomes apparent. . . . **The continuation of a special relationship offering the possibility of correction of the injury may postpone that date further.** . . . The continuing wrongful conduct of the defendant toward the claimant which establishes a status quo of

continuing injury may also give rise to a continuing cause of action.

68. One court said:

> Although the effects of the alleged wrongful conduct may have continued . . . nevertheless the cause of action accrued when the alleged wrongful conduct actually occurred. . . .

Newberg v. FSLIC, 317 F.Supp. 1104 at 1106 (N.D.Ill. 1970). Another said that:

> Plaintiff may not, in effect, hide its head in the sand, ignoring the accrual of a cause of action until the two-year limitation period had expired and then attempt to circumvent the limitation by alleging a combination of tortious acts or a continuing tort. . . .

United Mo. Bank S. v. United States, 423 F.Supp. 571, 577 (W.D. Mo. 1976). And another that:

> A continuing tort sufficient to toll the statute of limitations is occasioned by continuing unlawful acts, not continuing ill effects from an original tort.

Ward v. Caulk, 650 F.2d 1144, 1147 (9th Cir. 1981).

69. 583 F.Supp. 349 (D.Mass. 1984).

70. Id. at 351.

71. In re Swine Flu, 764 F.2d at 640.

72. The court stated that:

> First, no record has yet been developed to indicate the extent to which Sanborn's immediate community in fact was made aware of the causal connection between the vaccine and GBS-like symptoms . . . .
>
> Even if the facts indisputably demonstrate some community awareness . . . we have recently held that a series of press releases, accompanied by . . . letters to over 20,000 physicians, did not put a plaintiff who had suffered injuries [from] use of the Dalkon Shield . . . on notice for purposes of the discovery rule. . . . We instead found accrual on the date when plaintiff viewed a "60 Minutes" program which discussed the Dalkon Shield's dangers.

Id. at 640-41 (citations omitted).

73. 668 F.2d 704 (3rd Cir. 1981).

74. Id. at 710.

75. 688 F.2d 1325 (11th Cir. 1982).

76. 28 U.S.C.A. §2680(a) (West 1965).

77. 346 U.S. 15.

78. Recently, the Ninth Circuit was more charitable: "[T]he Court's language, however, was expansive, and appeared to sweep within the exception conduct . . . ranging from a cabinet-level decision . . . to the lower-level decisions concerning fertilizer loading." Ariz. Maint. Co. v. United States, 864 F.2d 1497, 1500 (1989).

79. There were almost 8500 plaintiffs: 1510 for wrongful death; 988 for personal injury; and 5987 for property damage.

80. The complaint had over 80 counts which included general allegations of negligence in drafting and adopting the plan, specific allegations regarding manufacture, handling, transportation and shipment, failure to warn, that FGAN was inherently dangerous, and negligent supervision of shipboard loading and firefighting. Unfortunately, the district court opinion wasn't published. The record was extremely long--the circuit court said it exceeded 20,000 pages while Justice Jackson said it was over 30,000.

81. In re Tex. City Disaster Litig., 197 F.2d 771 (1952).

82. H.R. Rep. No. 2245, 77th Cong., 2d Sess., p. 10; S. Rep. No. 1196, 77th Cong., 2d Sess., p. 7; H.R. Rep. No. 1287, 79th Cong., 1st Sess., pp. 5-6; Hearing before H.Com. on Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess., p. 33.

83. The portion Justice Reed referred to started with the discretionary function--the second clause--and then noted the due care execution clause which is first. Then it returned to the second clause, went back to the first and concluded by saying that torts by employees of regulatory agencies were included (i.e., the government was liable) to the same extent as for the torts of nonregulatory agency employees.

84. 28 U.S.C.A. §2680 (b)-(n) (West 1965 & Supp. 1989).

85. 346 U.S. at 32.

86. The specific exclusions bar claims arising from tax assessments or detention of goods, quarantines, admiralty, certain military activities, intentional torts, fiscal operations of the Treasury, military combatant activities, and TVA, Panama Canal

Company, or certain banking activities. Except for Section 2680(b), none of these even mention negligence.

87. Justice Reed's misunderstanding is clear from one statement: "to impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine . . . ." 346 U.S. at 44. Any activity involving establishment of a quarantine was specifically excluded by Section 2680(f). There is no such specific exclusion for the Coast Guard and, therefore, its liability is controlled by the general exclusions. The analogy simply doesn't work.

88. The full quotation is as follows:

> One need only read Section 2680 in its entirety to conclude that Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions. Negligence in administering the Alien Property Act, or establishing a quarantine, assault, libel, fiscal operations, etc., were barred.

346 U.S. at 32. The topic of the paragraph was negligence; the subject of the second sentence was the same. Consequently, one could assume that Justice Reed was indeed addressing that subject. Assault and libel, however, don't involve negligence. Negligence in executing the Alien Property Act--or any other statute was not barred by Section 2680(a). The only portion of this exception that discusses negligence was 2680(b) for the postal service. At best, this comment was poorly constructed.

89. Hatahley v. United States, 351 U.S. 173 (1956).

90. 346 U.S. at 26, 28, 32.

91. The confusion that resulted from this choice of words is illustrated in an annotation:

> The legislative history of this chapter and section 1346(b) of this title indicates that while Congress desired to waive Government's immunity from action for injuries to person and property occasioned by tortious conduct of its agents acting within their scope of business, it was not contemplated that Government should be subject to liability arising from acts of a governmental nature or function.

See 28 U.S.C.A. §2680 (West 1965 & Supp. 1989) p. 290 n.21 (emphasis added).

92. His dissent in Indian Towing dispels any supposition to the contrary. See 350 U.S. at 76.

93. Nor did he define what "discretion" meant:

> It is unnecessary to define, apart from this case, precisely where discretion ends. It is enough to hold, as we do, that the "discretionary function or duty" that cannot form the basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives and administrators in establishing plans, specifications or schedules of operation.

346 U.S. at 35-36.

94. This is particularly revealing when considered in conjunction with his misapplication of the private person liability standard. The Act said that liability attached "in the same manner and to the same extent as a private person under like circumstances." Justice Reed substituted municipal corporation for private person and, in effect, asked the wrong question. He should have asked: "If a private person had done what the government did, would that private person be liable?" Though it is axiomatic that statutory waivers of sovereign immunity are strictly construed, Justice Reed was apparently overly concerned with preserving governmental immunity, despite Congress' clear statement to the contrary.

95. Justice Reed's opinion merely echoed that of the court of appeals:

> We have found no place in the legislative hearings where . . . liability . . . as a manufacturer or shipper was discussed. Typical of the kind of immunity intended to be waived is that resulting from the negligent operation of motor vehicles . . . .

197 F.2d at 776. The dissent in Dalehite took issue with this interpretation:

> Surely a statute so long debated was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that "The King can do no wrong" has not been uprooted; it has merely been amended to read, "The King can do only little wrongs."

346 U.S. at 60.

96. As the dissent pointed out:

> But many acts of government officials deal with only the housekeeping side of federal activities. The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. In this area, there is no good reason to stretch the

legislative text to immunize the Government or its officers from responsibility for their acts, if done without appropriate care for the safety of others.

346 U.S. at 60.

97. At one point, he read the statute as saying "to the same manner" rather than "in the same manner". 346 U.S. at 44.

98. 340 U.S. 135 (1950).

99. 346 U.S. at 43, quoting Feres, 340 U.S. at 143.

100. Feres involved the issue of whether an active duty service member could recover damages resulting from or "incident to" military service. That decision concluded, inter alia, that the special relationship between the military superior and subordinate precluded imposition of traditional tort liability. Although the opinion commented that state law didn't provide a remedy in similar circumstances, the majority did not necessarily rely on lack of state law as a justification for finding no liability:

> The nearest parallel, even if we were to treat "private individual" as including a state, would be the relationship between the states and their militia. But if we indulge plaintiffs the benefit of this comparison, claimants cite us no state, and we know of none, which has permitted members of its militia to maintain tort actions for injuries suffered in the service.

340 U.S. at 143 (emphasis added). See infra pp. 21-29 and accompanying notes.

101. For example, in concluding that no further experimentation into FGAN's explosiveness was necessary, Justice Reed relied upon TVA's experience in production. But this accident occurred during shipment. TVA conducted its research well before this program was conceived--it is doubtful that TVA contemplated shipping quantities of FGAN overseas in large ocean-going tankers loaded with any number of other commodities. The dissent noted:

> The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried on carelessly by those in charge of detail. We cannot agree that all the way down the line there is immunity for every balancing of care against cost, of safety against production, of warning against silence.

346 U.S. at 58.

102. The opinion stated:

> It necessarily follows that the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of Section 2680(a) would fail at the time it would be needed, that is when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion.

346 U.S. at 36. The subordinate's action should have been the focus. For if the subordinate is directed to perform a particular task by the superior, then the subordinate has no discretion to act. If Justice Reed had analyzed this case using the planning--operational test, he would have concluded that unless the subordinate was performing a planning function, liability would attach.

103. His offhand but famous comment follows:

> The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program.

346 U.S. at 42. In my opinion, Justice Reed did not intend for the issue to become so obtuse: if the activity was governmental, then there was no liability under the Act.

Perhaps Section 2680(l)--which excludes claims "arising from the activities of the Tennessee Valley Authority--had a more significant impact on the outcome than his casual footnote otherwise suggests. See 346 U.S. at 39 n.34.

104. This decision had an unfortunate impact on the FTCA. It took months of analysis to determine that Justice Reed really didn't understand what he was dealing with. I had the luxury, if you will, of no mandatory filing date; how easy it was for private practitioners and judges to grasp the only apparent rationale this opinion provided under judicially imposed deadlines without thoroughly analyzing this confused but seemingly correct decision.

In sum, this opinion did a significant disservice, particularly because it was a case of first impression. Congress isn't worthy of high marks in attentiveness, either, though one can speculate that they were as confused and captivated by the opinion's apparent rationality. Nevertheless, it has taken almost 40 years and an untold number of cases and unrequited, injured plaintiffs to undo what this opinion established.

105. 350 U.S. 61 (1955).

106. The Court stated:

> There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation . . . .
> [The statute's purpose] was to compensate victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable . . . .

Id. at 68.

107. He commented that private bills had been introduced but that Congress had not shown displeasure with the Dalehite decision. 350 U.S. at 73 n.6, citing 69 Stat. 707; H.R.Rep. No. 2024, 83rd Cong., 2d Sess.; S.Rep. No. 2363, 83rd Cong., 2d Sess.; H.R.Rep. No. 1305, 84th Cong., 1st Sess.; H.R.Rep. No. 1623, 84th Cong., 1st Sess.; S.Rep. No. 684, 84th Cong., 1st Sess.

108. 350 U.S. at 76.

109. Rayonier Inc. v. United States, 352 U.S. 315, 317 (1956).

110. 467 U.S. 797 (1984).

111. United Scottish Ins. Co. v. United States, 692 F.2d 1209 (1982); Varig Airlines v. United States, 692 F.2d 1205 (1982), as amended.

112. The new test was described by the Court as follows:

> First, it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies . . . . Thus, the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a Government employee--whatever his or her rank--are of the nature and quality that Congress intended to shield from tort liability.
>
> Second, whatever else the . . . exception may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as regulator of the conduct of private individuals . . . . Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.

467 U.S. at 813-14 (emphasis added).

113. The Court stated that:

> The FAA's implementation of a mechanism for compliance review is plainly discretionary activity of the "nature and quality" protected by [Section] 2680(a). When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary authority of the most basic kind.

Id. at 819-20.

114. The Court held that:

> In administering the "spot-check" program, [they] necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to the specific grant of authority in the regulations and operating manuals. Under such circumstances, the FAA's alleged negligence in failing to check specific items in the course of certificating a particular aircraft falls squarely within the discretionary function exception.

Id. at 820.

115. Id. at 821 (emphasis added).

116. The Ninth Circuit characterized the Court's lack of precision in Varig Airlines as follows:

> The Court used language which some courts, including our own, may have misinterpreted as extending the discretionary function beyond policy choices to negligent failures to follow known safety standards.
>
> . . . .This language has created confusion concerning what negligent conduct by federal officials will subject the United States to liability.
>
> . . . . As a result, the discretionary function exception at times has threatened to swallow the FTCA's waiver of sovereign immunity.

Aris. Maint. Co., 864 F.2d at 1500.

117. Again, as the Ninth Circuit put it:

> [Berkovitz] made it clear that government employees are to adhere to objective standards of care, and that conduct which does not adhere to such standards is actionable under the FTCA even though it may be undertaken in implementing a policy decision.

Ariz. Maint. Co., 864 F.2d at 1501. The Court also stated that **Berkovitz** "separated the making of discretionary policy from its nondiscretionary implementation" and that:

> Thus, under **Berkovitz**, the key inquiry is not whether the government employee has a choice, but whether that choice is a policy judgment.

864 F.2d at 1503. The court gave itself some credit for applying this reasoning before the Supreme Court did. 864 F.2d at 1503, citing Huber v. United States, 838 F.2d 398 (1988); **ARA** Leisure Service, 831 F.2d 193 (1987); Seyler v. United States, 832 F.2d 120 (1987). **Huber** involved a negligent Coast Guard rescue:

> We recognized that the Coast Guard, because of its limited resources, could not help all ships in distress, and had to make a policy judgment to use its resources to help plaintiff's ship. This decision was a protected discretionary function. . . . However, its subsequent conduct in rendering assistance was not immune from scrutiny and had to comply with the applicable standard of care.

864 F.2d at 1503, citing **Huber**, 838 F.2d at 401. **ARA** involved failure to maintain a road:

> . . . [w]here the challenged governmental activity involves safety considerations under an established policy rather than a balancing of competing public policy considerations, the rationale for this exception falls away and the United States will be held responsible for the negligence of its employees . . . [T]he failure to maintain the road in safe condition was not a decision grounded in social, economic, or political policy . . . .

864 F.2d at 1503, quoting **ARA**, 831 F.2d at 195. As to **Seyler**, the court simply stated that: "we doubt that any decision not to provide adequate signs would be 'of the nature and quality that Congress intended to shield from tort liability.'" 864 F.2d at 1503, quoting 832 F.2d at 123, quoting **Varig**, 467 U.S. at 813-14. The **Ariz. Maint.** case involved damages done to plaintiff's water supply by blasting done by the Corps of Engineers. The Corps had three options in determining whether subsidence was a problem: researching available geologic data, test drilling or blasting. It chose the latter because it was less expensive and time consuming:

> Clearly a decision to use the cheapest and easiest method in contravention of safety standards could not be a protected discretionary function, any more than the

decision to leave a lighthouse in disrepair was protected in **Indian Towing**.

864 F.2d at 1504. The trial court record was insufficient on the issue of standard industry practices, so the case was remanded to develop this information and determine whether the amount of dynamite used was excessive. **But compare** this case with Payne v. United States, 730 F.2d 1434 (1984), where the Eleventh Circuit held that a Corps decision to widen river channels without studying the impact because the cost to do the study was greater than the amount of damages that could result was protected.

118. 108 S.Ct. 1954 (1988).

119. **Id.** at 1960.

120. **Id.** at 1960 n.4.

121. The Court concluded that:

> In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee . . . . [C]onduct cannot be discretionary unless it involves an element of judgment or choice . . . . Thus, the discretionary function will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. . . .
>
> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield . . . . The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy . . . [and] insulates the Government from liability if the action challenged . . . involves the permissible exercise of policy judgment.

Id. at 1958-59.

122. **Id.** at 1959.

123. The Court said: "When a suit charges the agency with failing to act in accord with a specific mandatory directive, the discretionary function does not apply." **Id.** at 1963.

124. **Id.** at 1963.

125. 28 C.F.R. §14.3 (1988).

126. **See, e.g.**, United States v. Muniz, 374 U.S. 150 (1963) (federal prisoners); United States v. Yellow Cab Co., 340 U.S. 543 (1951) (third-party claimants); United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949) **and** United States v. U.S.A.A., 238 F.2d 364 (8th Cir. 1956) (insurance subrogees); Crain v. United States, 443 F.Supp. 202 (N.D.Cal. 1977) (informants).

127. **Feres**, 340 U.S. 135. This doctrine has been extended beyond the FTCA to **Bivens** suits as well (citation omitted). **See** Chappell v. Wallace, 462 U.S. 296 (1983).

128. Brooks v. United States, 337 U.S. 49 (1949).

129. Johansen v. United States, 343 U.S. 427 (1952). The FECA, as originally enacted, contained no exclusivity language but a 1949 amendment added such a provision. **See** 5 U.S.C.A. §8116(c) (West 1980).

130. There was no suggestion that either involved purely elective surgery but one case was a rather blatant "foreign object" case.

131. **Feres**, 177 F.2d 535 (2nd Cir.); Jefferson v. United States, 77 F.Supp. 706 (D. Md.), **aff'd**, 178 F.2d 518 (4th Cir.); United States v. Griggs, 74 F.Supp. 209 (D.Colo.), **aff'd**, 178 F.2d 1 (10th Cir.).

132. 340 U.S. at 138.

133. "There is as much statutory authority for one as for another of these conclusions." 340 U.S. at 144. Though the Court in effect concluded that silence in both the statute and its legislative history did not preclude judicial implication of a significant exclusion, it refused to imply a similar bar for federal prisoners in **Munis**, 374 U.S. 150 (1963). The Third Circuit also, implicitly, refused to imply an exclusion to the FECA in Miller v. Bolger, 802 F.2d 660 (1986):

> Had Congress intended that FECA recovery would preclude Title VII relief from the United States, it is likely that there would be some reference to this intent either in the 1972 statute or in its legislative history. . . . No such mention is to be found. To the contrary, the legislative history of the Equal Opportunity Act of 1972 suggests that its extension of Title VII's coverage to certain employees was intended to make available to these federal employees the same benefits and protections from discrimination available in the private sector by removing "legal obstacles in obtaining meaningful remedies. H.R. Rep. No. 238, 92d Cong., 2d Sess.,, reprinted in 1972 Code Cong. and Admin. News 2137, 2159-60. We believe that this supports our conclusion that Congress did not intend that recovery for tortious injury

under FECA should preclude Title VII remedies for discrimination.

802 F.2d at 664.

134. 340 U.S. at 139.

135. 340 U.S. at 141-42. The Court did not discuss caselaw involving workers' compensation schemes, even though a military reservation is clearly analogous to a company-owned town. Analysis of state worker's compensation laws, i.e., to see if housing fires or medical malpractice is covered by tort or compensation schemes, is outside the scope of this paper. It is curious that this concept wasn't mentioned.

The Court also did not discuss, Wilkes v. Dinsman, 48 U.S. (7 How.) 86, 129 (1849), a case asserting that a naval commander, who had excessively flogged and imprisoned enlisted seamen, could be held liable for damages at common law:

> In such a critical position, his reasons for action, one way or another, are often the fruits of his own observation, and not susceptible of technical proof on his part. No review of his decisions, if within his jurisdiction, is conferred by law on either courts, or juries, or subordinates, and, as this court held in another case, it sometimes happens that "a prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object." "While subordinate officers or soldiers are pausing to consider whether they ought to obey, or are scrupulously weighing the evidence of the fact upon which the commander-in-chief exercises the right to demand their services, the hostile enterprise may be accomplished without the means of resistance." 12 Wheaton, 30.
>
> **Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But for acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office, however elevated or however humble his victim.** 2 Carr. & Payne, 158, note; 4 Taunton, 67.

136. After remand, the Court noted:

> **But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or illwill, or the wantonness of power, without giving him**

> redress in the courts of justice. . . . He is not liable to an action for a mere error in judgment, even if the jury suppose that milder measures would have accomplished his object.
>
> . . . .
>
> But, on the other hand, he was equally bound to respect and protect the rights of those under his command, and to cause them to be respected by others; to watch over their health and comfort; and, above all, never to inflict any severe or harsher punishment than he, at the time, conscientiously believed to be necessary to maintain discipline or due subordination in his ships. . . . . if from, malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action.
>
> . . . .
>
> [The question is] whether in the exercise of that discretion and judgment with which the law clothed him for the time, and which is in he nature of judicial discretion, he acted with improper feelings, and abused the power confided to him to the injury of the plaintiff.

Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 401, 404 (1851) (emphasis added). This language suggests concepts like the discretionary function defense, abuse of discretion, willful and wanton misconduct, and gross negligence. Simple negligence or "mere error[s] in judgment" would not result in liability. This case, of course, did not involve the FTCA but was an action at common law.

137. Instead of determining whether a private person was liable "under like circumstances"--due to negligently caused fire or medical malpractice--the Court focused on the fact that private parties cannot raise armies. That is, the Court looked at the overall activity involved (the military) and not the allegedly negligent acts:

> It is true that if we consider relevant only part of the circumstances and ignore the status of both the wronged and the wrongdoer in these cases we find analogous private liability.
>
> . . . . the liability assumed by the Government here is that created by "all the circumstances" not that which a few circumstances might create.

340 U.S. at 142 (emphasis added). The statute says "under like circumstances," or "under circumstances." It does not say under "all circumstances."

138. 340 U.S. at 142-43. Compare this argument as applied to federal prisoners in Munis, 374 U.S. at 162. The D. C. Circuit commented that this factor:

> . . . evades easy application. The Supreme Court has never made clear why this relationship makes impossible the determination of an analogous private liability, given that such a determination has been made in cases involving other relationships that are seemingly just as "distinctively federal in character."

Hunt v. United States, 636 F.2d 580, 597 (D.C.Cir. 1980). Furthermore, the distinctively federal relationship factor was obtained from a prior decision involving an attempt by the government to recover the costs of medical care provided to a military member injured by a negligent tortfeasor. United States v. Standard Oil Co., 332 U.S. 301 (1947). The Court refused relief. Though the language "distinctively federal relationship" continues to justify application of the Feres doctrine, Congress cured the situation from which this language arose by enacting, in 1962, the Federal Medical Care Recovery Act, 42 U.S.C. §§2651-2653.

139. 340 U.S. at 146. Yet, the VBA, 38 U.S.C §§ 301, et seq, contains no exclusivity provision. See, United States v. Brown, 348 U.S. 110, 113 (1954); Brown v. United States, 739 F.2d 362, 365 (8th Cir. 1984), cert. denied, 105 S.Ct. 3524 (1985); Brooks, 337 U.S. at 52-53.

140. Whether or not this proposition was correct is subject to question. See, e.g., Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 103 (3rd Cir. 1986), where the court noted:

> Military officers have not always been afforded absolute immunity from damages suits. The leading nineteenth century case is Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849), after remand, Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851), in which the Court held that a naval commander alleged to have flogged and imprisoned an enlisted seaman could be held liable for damages at common law.

141. 346 U.S. at 146 (footnote added).

142. Munis, 374 U.S. 150. This case consolidated the appeals of one case involving medical malpractice and another alleging negligent supervision. Inter alia, the Court concluded that Congress intended to allow such claims to avoid private bills. 374 U.S. 154-55 n.7. As the government pointed out, however, Congress continued passing private bills for federal prisoners even after passage of the FTCA. See 374 U.S. at 158 n.14. The Court acknowledged this fact but found it not determinative. Further, though the injury involved in one case resulted from an assault,

the Court didn't address whether section 2680(h)'s exclusion applied. Twenty-three years later, the Court characterized allegations of negligent supervision as being founded solely on assault, for which the government is not liable. See United States v. Shearer, 473 U.S. 53 (1985).

143. In United States v. Munis, the Court characterized the issue as follows:

> That such an exception was absent from the Act itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills. We therefore feel that the want of an exception for prisoners' claims reflects a deliberate choice, rather than an inadvertent omission.

374 U.S. at 156-57. Apparently, this Court would consider the lack of express exclusion of incident to service claims as inadvertent, rather than inadvertent.

The Government also argued that "the impact of liability upon prison discipline would so seriously impair the administration of our prisons that Congress could not have intended such an 'extreme' result". 374 U.S. at 159. Prisoners also have a compensation system but these plaintiffs were not covered. 374 U.S. at 160.

144. 337 U.S. 49 (1949).

145. The third plaintiff was their father, who was also injured.

146. 169 F.2d 840 (1948).

147. The court said:

> If soldiers could sue for such injuries as illness based on the alleged negligence of the company cook or mess sergeant, or if soldiers who contract sickness on wintry sentry duty had a right of action against the Government on the allegation of a negligent order given by the company commander, then the traditional grousing of the American soldier would result in the devastation of military discipline and morale.

Id. at 845.

148. Judge Dobie noted:

> If . . . Congress did intend to include soldiers within the scope of the Act, every dictate of common sense would seem to require that Congress would manifest this intention not by inference or implication but, on so important a matter, by emphatic positive expression to

that effect, in words so clear they could be readily understood, even by federal judges.

Id. But the decisions are inconsistent. In Feres, congressional and statutory silence resulted in implication of an exclusion. In Munis and Miller v. Bolger, the reverse was true.

149. 169 F.2d at 845.

150. Based on expressio unius est exclusio alterius.

151. The Act excludes: "Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C.A. §2680(j) (West 1965 & Supp. 1989).

152. The Act excludes: "Any claim arising in a foreign country." 28 U.S.C.A. §2680(k) (West 1965 & Supp. 1989). Note that both §§2680(j) and (k) bar all claims, not just those of military members.

153. Judge Dobie stated that:

> Thus, under the first exception [combatant activities], a soldier killed or injured in the important and perilous combat activities of war would be denied a recovery; while there would be a perfect claim for the soldier killed or injured in non-combat activities. Under the second exception [activities in foreign countries], for a soldier injured or killed while stationed in Canada, no recovery; for a soldier injured or killed at Plattsburgh, New York, just a few miles from the Canadian border, again a recovery. It is difficult for us to think that Congress intended such results to flow from the Federal Tort Claims Act.

169 F.2d at 844.

154. 337 U.S. at 51.

155. Expressio unius est exclusion alterius.

156. Id.

157. 337 U.S. at 52.

158. Id. at 52-53.

159. The Fourth Circuit characterized the problem, as follows:

> "This problem of statutory interpretation is close and difficult, due primarily to the inept draftsmanship on the

part of Congress in failing to make clear and express provision as to soldiers in the United States Army."

Brooks, 169 F.2d at 842.

160. In comparing the **Feres** and **Brooks** opinions, one court stated that "[a]lthough the principles of these two cases are thought to be compatible, their application to diverse fact situations is not free of difficulty--and the numerous decisions following one or the other of the leading cases fail to alleviate the confusion." Gursley v. United States, 232 F.Supp. 614, 615 (D.Colo. 1964). Another noted that its "task [was] complicated by the imprecise contours of the doctrine enunciated in **Feres**." **Hunt**, 636 F.2d at 582.

161. Miller v. United States, 643 F.2d 481, 492 (8th Cir. 1981).

162. Zoula v. United States, 217 F.2d 81, 84 (5th Cir. 1954), **reh'g denied**. But if the words were so carefully chosen, why has so much litigation resulted? And what is so strange about barring recovery only in the circumstances this court rejects?

163. Hale v. United States, 416 F.2d 355, 360 (6th Cir. 1969).

164. **See** Hall v. United States, 451 F.2d 353 (1st Cir. 1971); United States v. Lee, 400 F.2d 558 (9th Cir. 1968), **cert. denied**, 393 U.S. 1053. Justice Marshall's dissent in Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 674 (1977) shows that he agrees with the Sixth Circuit: "I cannot agree that that narrow, judicially created exception . . . should be extended to any category of litigation other than suits . . . based on injuries incurred while on duty."

165. Parker v. United States, 611 F.2d 1007 (5th Cir. 1980) **reh'g denied**.

166. Duty or function appears to be the last factor considered by other courts. **See** 611 F.2d at 1013.

167. **Brown**, 348 U.S. 110; Adams v. United States, 728 F.2d 736 (5th Cir. 1984). **But see** cases cited in Section VII., infra pp. 59-61, on the independent tort of failure to warn post-discharge, for injuries incurred "incident to service."

168. The court noted that:

> [O]ne who is on active duty and on duty for the day is acting "incident to service.". . . One on furlough or leave . . . normally has an FTCA action . . . . One with only an unexercised right to a pass or who is only off duty for the day usually is held to be acting "incident to service.

Parker, 611 F.2d at 1013 (citations omitted). "Unexercised" in this context means the injury occurred on the installation. Compare Watkins v. United States, 462 F.Supp. 980 (S.D.Ga.), aff'd, 587 F.2d 279 (5th Cir.), cert. denied, 466 U.S. 959 (1984), with Hand v. United States, 260 F.Supp. 38 (M.D.Ga. 1966) and Knecht v. United States, 144 F.Supp. 786 (E.D.Pa.), aff'd, 242 F.2d 929 (3rd Cir. 1957). For other unexercised pass cases, see Camassar v. United States, 400 F.Supp. 894 (D.Conn. 1975); Coffey v. United States, 324 F.Supp. 1087 (S.D. Ca.), aff'd 455 F.2d 1380 (9th Cir. 1972); Zoula, 217 F.2d 81; Frazier v. United States, 372 F.Supp. 208 (M.D.Fla. 1973); Ritzman v. Trent, 125 F.Supp. 664 (E.D.N.C. 1954).

169. Williams v. United States, 248 F.2d 492, 506 n.6 (9th Cir. 1952), quoting United States v. Williamson, 23 Wall. 89, 91, 90 U.S. 411, 415 (1874).

170. Uptegrove v. United States, 600 F.2d 1248 (9th Cir. 1979), reh'g denied.

171. United States v. Shearer, 473 U.S. 52. The Court's characterization of plaintiffs allegation of negligent supervision is suspect. Though the Neustadt case, 366 U.S. 696 (1961), did suggest that negligence allegations that are tied to, e.g., misrepresentation were barred, the Supreme Court implicitly overruled this portion of the decision in Block v. Neal, 460 U.S. 289 (1983).

172. The Court stated:

> Unlike [vehicular] negligence, the claim here would require Army officers to testify in court as to each other's decisions and actions . . . . [C]ommanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct. But as we noted in Chappell v. Wallace, such "complex, subtle and professional decisions as to the composition, training . . . and control of a military force are essentially professional military judgments."

473 U.S. at 57-58 (citations omitted), discussing 739 F.2d 1102 (emphasis added). The "complex, subtle and professional" military decision was whether to continue to employ and how to supervise a service member previously convicted of manslaughter.

173. The perpetrator was also convicted by New Mexico authorities for this offense. On its face, this was not a particularly "complex" or "military." decision. Military members are subject to a wide range of "restraints" when off-base, including the

possibility of administrative discharge or courts-martial for activities occurring wholly outside of and having nothing to do with the military. As to administrative discharge, see, e.g., Air Force Regulation 39-10 (enlisted members) and 36-2 (officers). As to courts-martial, see United States v. Solorio, 21 M.J. 251 (C.M.A. 1986).

If considering the merits would have involved "the judiciary in sensitive military affairs at the expense of military discipline and effectiveness," the discretionary function defense may have precluded "respondent's attempt to hale Army officials into court to account for their supervision and discipline." 473 U.S. at 59.

174. See Hand, 260 F.Supp. at 40, where the court posed the issue as "whether a quail hunt is an activity incident to . . . military service . . . ."

175. See, e.g., Miller, 643 F.2d 481 (8th Cir. 1981), rev'g 478 F.Supp. 989 (E.D.Mo. 1979), where the court held that an off duty military member employed part-time as a house painter could not recover for injuries that occurred while painting a house on-base. Also Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (on-base, off duty, swimming pool death); Mason v, United States, 568 F.2d 1135 (5th Cir. 1978) (per curiam) (on-base, off duty motorcycle accident); Mariano v. United States, 444 F.Supp. 316 (E.D.Va. 1977) (on-base, off duty, assault on employee of club); Gursley, 232 F.Supp. 614 (on-base, off duty, explosion in housing area); Richardson v. United States, 226 F.Supp. 49 (E.D.Va. 1964) (weekend liberty, assault in NCO club); Ritzman v. Trent, 125 F.Supp. 664 (on-base, off duty, working on private automobile).

176. 611 F.2d at 1014.

177. 431 U.S. at 672.

178. Id. at 1015.

179. Id. at 1014. As one court noted, there is little difference between living (or shopping for groceries) on-base or off. Gursley, 232 F.Supp. at 616-17. Military members may, generally, choose where they live and shop. If one is injured off-base in a non-duty status, a claim is compensable; if the same type of injury occurs on-base, it is not. Compare Soula, 217 F.2d 81, with Parker, 611 F.2d 1007. If military aircraft crash into houses located on and off-base, only the off-base occupants may sue. Compare Sapp v. United States, 153 F.Supp. 496 (W.D.La. 1957) with Preferred Ins. Co. v. United States, 222 F.2d 942 (9th Cir.), cert. denied, 350 U.S. 837 (1955). Both accidents "arise" from military service but both have "little to do with the soldier's military service." 611 F.2d at 1015. Since the injured person would generally not have been in that particular place--on or off the installation--BUT FOR military service, see Briggs v. United States, 617 F.Supp. 1399 (D.R.I. 1985), perhaps both should be

barred. And since medical malpractice claims of dependents and retirees are no less "but for" military service, perhaps they should be barred as well.

In sum, the Feres rule should be applied across the board or not at all. Uniformity is the watchword of the military. Perhaps courts should follow their own reasoning: "Like facts demand like treatment, absent an intervening change in the law." Briggs, 617 F.Supp. at 1401.

180. Adams v. United States, 728 F.2d at 736, 739 (5th Cir. 1984).

181. Id.

182. Id. at 741 (citations omitted).

183. Alexander v. United States, 500 F.2d 1 (8th Cir. 1974), applying the Feres rule to a claim brought against the Public Health Service. See also Henninger v. United States, 473 F.2d 814, 816 (9th Cir.), cert. denied, 414 U.S. 819 (1973) where the Ninth Circuit reasoned that "[t]his is a classic situation where the drawing of a clear line is more important than being able to justify in every conceivable case, the exact point at which it is drawn."

184. 804 F.2d 561, modified, 813 F.2d 1006, withdrawn in light of United States v. Johnson, 107 U.S. 2063 (1987).

185. 473 U.S. at 58 n.4.

186. 804 F.2d at 564.

187. Id. at 565.

188. 107 S.Ct. 2063 (1987).

189. 825 F.2d 202, 205 (1987).

190. Though courts are less inclined to discriminate when liability is sought against the federal government. See, e.g., Cooner v. United States, 276 F.2d 220, 225 (4th Cir. 1960), where the court noted that "[a] serviceman on leave or on pass cannot, normally, be said to be acting within the scope of his employment."

191. Solorio, 21 M.J. 251.

192. Miller, 643 F.2d at 494 (8th Cir. 1981).

193. "Terminal leave is ordinary leave granted with separation or retirement where member will be in leave status on the last day of active duty." Air Force Reg. 35-9, para. 1-27 (7 August 1981), quoted in Madsen v. United States, No. 87-2046 (10th Cir. December 29, 1987) (LEXIS, GENFED library, App. file).

194. **See, e.g., Feres**, 340 U.S. at 138; **Johnson**, 107 S.Ct. at 2066-67; Martinelli v. United States, 812 F.2d 872 (3rd. Cir. 1987); **Rayonier**, 352 U.S. at 320. One such case is United States v. Brown where the Court said that if Congress wanted to make the VBA exclusive, it could do so. 348 U.S.at 113.

Despite no action on the VBA in 35 years, this fact isn't cited for the proposition that Congress didn't intend it to be exclusive. Failure to act on **Feres** is constantly cited as a reason not to judicially overrule the doctrine.

Judge Parker's (4th Circuit) dissent in **Brooks** noted:

> Legislation is a matter for Congress, not for the Court . . . . It is neither reasonable nor respectful to Congress for the courts to assume that the import of the general language used in the statute was not understood or that language excluding soldiers from the benefit of the act was omitted through inadvertence. . . . It is not reasonable to assume that the claims of soldiers were overlooked at a time when soldiers and their rights were so prominently in the public mind, when prior proposed legislation dealing explicitly with that matter and when the act itself explicitly repealed legislation under which limited relief could be granted them.

169 F.2d at 847.

195. **Miller**, 643 F.2d 481.

196. **Id.** at 496-97 (emphasis added).

197. **Id.** at 497.

198. **Id.**

199. **Id.** at 497-98 (emphasis added). The overwhelming majority of FTCA cases are resolved without litigation. Most don't involve extensive discovery. Using Judge Heaney's approach, incidents impinging on military discipline, relationships or involving military duties, functions or missions would still be barred. Most are probably barred by statutory exceptions, like the discretionary function or intentional tort exclusions. A less intrusive alternative would amend the Military Claims Act, 10 U.S.C.A. §§2731, 2733, 2735 (West 1983 & Supp. 1989), to allow claims but no judicial remedy. But, again, Congress and the courts have failed to act.

200. Lutz v. United States, 685 F.2d 1178, 1183 (Ninth Cir. 1982) citing Craft v. United States, 542 F.2d 1250 (5th Cir. 1976).

201. Denham v. United States, 646 F.Supp. 1021 (W.D. Texas 1986). Army personnel were injured while on liberty at a park operated by the Corps of Engineers. Though plaintiff was on active duty, the injury did not occur on base nor was he participating in service-sponsored recreational activities. The claim was not barred by Feres because the "policy considerations underlying [that] doctrine [do not] preclude Plaintiff's FTCA claim." Id. at 1025.

202. United States v. Carroll, 369 F.2d 618 (8th Cir. 1966).

203. Mattos v. United States, 412 F.2d 793 (9th Cir. 1969); O'Brien v. United States, 192 F.2d 948 (8th Cir. 1951).

204. Layne v. United States, 295 F.2d 433 (7th Cir.), cert. denied, 368 U.S. 990 (1962).

205. Collins v. United States, 642 F.2d 217 (7th Cir. 1961).

206. See, e.g., Layne, 295 F.2d 433. Despite the fact that for scope of employment purposes the converse is not true. See Maryland v. United States, 381 U.S. 41 (1965).

207. Anderson v. United States, 724 F.2d 608 (8th Cir. 1983). But an erroneous recall order issued after medical discharge does preclude application of the rule. See Valn v. United States, 708 F.2d 116 (3rd Cir. 1983)

208. Grigalauskas v. United States, 103 F.Supp. 543 (D.Mass. 1951), aff'd, 195 F.2d 494 (1st Cir. 1952); Herring v. United States, 98 F.Supp. 69 (D.Col. 1951).

209. To say nothing, for example, of the vicissitudes of foreign laws. As noted previously, claims arising in a foreign country are excluded. Compare Newman v. Soballe, 871 F.2d 969 (11th Cir. 1989), which held that the Gonzalez Act, 10 U.S.C.A. §1089, allowed suit in either the foreign or federal court for medical malpractice claims occurring outside the Continental United States with Heller v. United States, 605 F.Supp. 144 (E.D.Pa. 1985), which held that the same Act required suit in the foreign country or a claim under the Military Claims Act, 10 U.S.C. §§2731, 2733, 2735, but that suit could not be filed in federal court.

210. Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

211. Johnson, 107 S.Ct. at 2068, where the Court stated "it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman," citing Stencel Aero., 431 U.S. at 672.

212. "It would hardly be a rational plan for those disabled in service by others in service to leave them dependent upon geogra-

phic considerations over which they have no control." Feres, U.S. at 143.

213. Van Sickel v. United States, 179 F.Supp. 791 (S.D.Cal.), aff'd, 285 F.2d 87 (9th Cir. 1960); United States v. Lee, 400 F.2d 558 (9th Cir. 1968); DeFont v. United States, 453 F.2d 1239 (1st Cir. 1972).

214. Grigalauskas, 103 F.Supp. 543.

215. Brown, 739 F.2d at 368.

216. United Air Lines, Inc. v. United States, 379 U.S. 951 (1964); Potts v. United States, 723 F.2d 20 (6th Cir.), cert. denied, 466 U.S. 959 (1984); Warner v. United States, 720 F.2d 837 (5th Cir. 1983); Jaffee v. United States, 663 F.2d 1226 (3rd Cir.), cert. denied, 456 U.S. 972 (1982); Lewis v. United States, 663 F.2d 889 (9th Cir.), cert. denied, 457 U.S. 1133 (1982); Carter v. Cheyenne, 649 F.2d 827 (10th Cir. 1981); Woodside v. United States, 606 F.2d 134 (6th Cir.), cert. denied, 445 U.S. 904 (1980); Uptegrove v. United States, 600 F.2d 1248 (9th Cir.), cert. denied, 444 U.S. 1044 (1980); Hass v. United States, 518 F.2d 1138 (4th Cir. 1975); United States v. Lee, 400 F.2d 558 (9th Cir.), cert. denied, 393 U.S. 1053 (1969); Sheppard v. United States, 369 F.2d 272 (3rd Cir.), cert. denied, 386 U.S. 982 (1967); Watkins, 462 F.Supp. 980; Layne, 295 F.2d 433.

217. United States v. Johnson, 779 F.2d 1492 (11th Cir. 1986).

218. 107 S.Ct. 2063 (1987).

219. Id. at 2070.

220. Id. at 2075.

221. Id. at 2071-72. Justice Scalia noted the justification for this factor had changed from concern for "the unfairness to the soldier of making his recovery turn on where he was injured" to "the military's need for uniformity." He did not accept either.

He commented that:

> Regardless of how it is understood, this second rationale is not even a good excuse in policy, much less in principle, for ignoring the plain terms of the FTCA. . . .
>
> The unfairness to servicemen of geographically varied recovery is, to speak bluntly, an absurd justification, given that, as we have pointed out in another context, nonuniform recovery cannot possibly be worse than (what Feres provides) uniform nonrecovery.

Id. The dissent continued by saying that:

> To the extent that the rationale rests upon the military's need for uniformity, it is equally unpersuasive . . . . Several of the FTCA's exemptions show that Congress considered the uniformity problem . . . yet . . . chose to retain sovereign immunity for only some claims affecting the military. . . . Moreover, we have effectively disavowed this "uniformity" justification--and rendered its benefits to military planning illusory--by permitting servicemen to recover under the FTCA for injuries suffered not incident to service, and permitting civilians to recover for injuries caused by military negligence. . . . Finally, it is difficult to explain why uniformity (assuming our rule is achieving it) is indispensable for the military, but not for the many other federal departments and agencies that can be sued . . . for the negligent performance of their "unique, nationwide function[s]."

Id. at 2072.

222. Id. at 2073-74. He also stated:

> The credibility of this rationale is undermined severely by the fact that both before and after Feres we permitted injured servicemen to bring FTCA suits, even though they had been compensated under the VBA. . . . We noted further that Congress had included three exclusivity provisions in the FTCA, 28 U.S.C. Sections 2672, 2676, 2679, but said nothing about servicemen plaintiffs . . . .

Id. at 2072 (emphasis by the court). He continued:

> Brooks and Brown (neither of which has ever been expressly disapproved) plainly hold that the VBA is not an "exclusive" remedy which places an "upper limit" on the Government's liability. Because of Feres and today's decision, however, the VBA will in fact be exclusive for service-connected injuries, but not for others. Such a result can no more be reconciled with the text of the VBA than with that of the FTCA, since the VBA compensates servicemen without regard to whether their injuries occurs "incident to service" as Feres defines that term. . . . In sum, "the presence of an alternative compensation system" [neither] explains [n]or justifies the Feres doctrine; it only makes the effect of the doctrine more palatable.

Id. at 2073, citing Hunt, 636 F.2d at 598.

223. Which was also applied by Judge Parker in his dissent in Brooks: "where express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." 169 F.2d at 849. The majority concluded that: "The maxim expressio unius est exclusio alterius is by no means a rule of statutory interpretation to be universally applied." 169 F.2d at 844.

224. 107 S.Ct. at 2074 (emphasis by the Court).

225. See, e.g., Johnson, 749 F.2d 1530, 1535; Heilman v. United States, 731 F.2d 1104, 1113 (3rd Cir. 1984); Scales v. United States, 685 F.2d 970, 974 (5th Cir.), cert. denied, 460 U.S. 1082 (1983); Peluso v. United States, 474 F.2d 605, 606 (3rd Cir.), cert. denied, 414 U.S. 879 (1973); Hitch, The Federal Tort Claims Act and Military Personnel, 8 Rutgers L. Rev. 316 (1954); Rhodes, The Feres Doctrine After Twenty-Five Years, 18 A.F.L Rev. 24 (1976); Note, From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?, 77 Mich. L. Rev. 1099 (1977).

226. 107 S.Ct. at 2074, quoting In re "Agent Orange" Prod. Liab. Litig., 580 F.Supp. at 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2nd Cir. 1984).

227. 5 U.S.C.A. §§8101, et seq (West 1980 & Supp. 1989).

228. Somma v. United States, 283 F.2d 149, 151 (3rd Cir. 1960).

229. See, e.g., S. Rep. No. 836, 81st Cong., 1st Sess., reprinted in 1949 U.S. Code Cong. & Admin. News 2125, 2136, 2143; United States v. Demko, 385 U.S. 149, 151 (1966).

230. 5 U.S.C.A. §8128(b) (West 1980).

231. See, e.g., Concordia v. United States Postal Service, 581 F.2d 439, 442-43 (5th Cir. 1978).

232. Grizalva v. United States, 781 F.2d 472 (5th Cir.), cert. denied, 107 S.Ct. 89 (1986); Whittier v. United States, 598 F.2d 561 (9th Cir. 1979); Cobia v. United States, 384 F.2d 711 (10th Cir.), cert. denied, 390 U.S. 986 (1968); Burke v. United States, 644 F.Supp. 566 (E.D.La. 1986); Levine v. United States, 478 F.Supp. 1389 (D.Mass. 1979); Pittman v. United States, 312 F.Supp. 818 (E.D.Va. 1970).

233. Thol v. United States, 218 F.2d 12 (9th Cir. 1954); Underwood v. United States, 207 F.2d 862 (10th Cir. 1953); Boyer v. United States, 510 F.Supp. 1081 (E.D.Pa. 1981); Levine, 478 F.Supp. 1389 (D.Mass. 1979).

234. One court stated that:

> The proper inquiry . . . is not merely whether the plaintiff is an "employee, his legal representative, spouse, dependents, next of kin, [or] any other person otherwise entitled to receive damages." . . . [the husband's] right to recover . . . is based upon his own personal injury, not a right of "husband and wife." The fact that the [injury] was transmitted through his spouse does not place [the husband] in a position different from that of any other unrelated, but similarly injured tort victim.

Woerth v. United States, 714 F.2d 648, 650 (6th Cir. 1983) (emphasis added).

235. Hudiburgh v. United States, 626 F.2d 813 (10th Cir. 1980); Mangan v. Weinberger, Civil File Nos. 3-85-1692, 3-85-1695 (D.Minn. Feb. 13, 1987) (LEXIS, GENFED library, Dist. file).

236. McNicholas v. United States, 226 F.Supp. 965, 968 (N.D.Ill. 1964). But see, Messig v. United States, 129 F.Supp. 571 (D.Minn. 1955).

237. The court stated:

> In so deciding, we are not abdicating the functions and responsibility of the court in favor of an administrative agency; rather, we are merely carrying out the obvious intent of Congress when it created the FECA. . . . Obviously, the purpose in so providing was to insure uniformity of interpretation and policy. Where, as here, admittedly a substantial question of coverage exists, especially in an area in which the Board has not yet authoritatively spoken, we think it extremely important that it have the opportunity to speak first.

Somma, 283 F.2d at 151 (3rd Cir.) (emphasis added).

238. Concordia, 581 F.2d at 442-43 (5th Cir.).

239. 703 F.2d 321 (1983).

240. 5 U.S.C.A. §8101 (19) (West 1980 & Supp. 1989).

241. 703 F.2d at 322. See also Posegate v. United States, 288 F.2d 11 (9th Cir.), cert. denied, 368 U.S. 832 (1961).

242. 669 F.2d 947 (4th Cir. 1982).

243. Guillain-Barre Syndrome.

244. 669 F.2d at 952, citing In re Estelle M. Krasprzak, 27 E.C.A.B. 339, 342 (1979).

245. 669 F.2d at 949 (emphasis added).

246. 687 F.2d 14 (3rd Cir. 1982).

247. 641 F.2d 195 (5th Cir. 1981).

248. 283 F.2d 149.

249. Concordia v. United States Postal Service, 581 F.2d 439.

250. Id. at 443.

251. 826 F.2d 227 (3rd Cir. 1987).

252. 826 F.2d at 229, quoting 2A Larson, Workmen's Compensation Law 14-229, Section 72.81 (1982), quoted in Wright v. United States, 717 F.2d 254, 259 (6th Cir. 1983).

253. Wright, 717 F.2d 254.

254. Balancio v. United States, 267 F.2d 135 (2nd Cir.), cert. denied, 361 U.S. 875 (1959); Leahy v. United States, 160 F.Supp. 519 (C.D.N.Y. 1959); Berry v. United States, 157 F.Supp. 317 (D.Or. 1957). Generally, these cases apply the common law tort rule that medical malpractice is a foreseeable consequence of negligently caused injury.

255. 306 F.2d 769 (D.C.Cir. 1962).

256. 474 F.2d 215 (3rd Cir. 1973).

257. 557 F.2d 204 (9th Cir. 1977).

258. 608 F.2d 1059 (5th Cir. 1979).

259. 781 F.2d 472 (5th Cir. 1986).

260. 451 F.2d 963 (5th Cir. 1971).

261. Id. at 965. It is interesting that the court characterized the location as being "more" rather than "about" or "approximately" a block away.

262. Id. at 967-68.

263. United States v. Udy, 381 F.2d 445 (1967); United States v. Browning, 359 F.2d 937 (1966).

264. Miller v. Bolger, 802 F.2d 660.

265. DeFord v. Secretary of Labor, 700 F.2d 281, 290 (6th Cir. 1983) (intentional discrimination); Lawrence v. United States, 631 F.Supp. 631 (E.D. Pa. 1982) (intentional infliction of emotional

distress); Newman v. United States, 628 F.Supp. 535 (D.D.C. 1986) (emotional distress); Sullivan v. United States, 428 F.Supp. 79 (E.D. Wisc. 1977) (harassment and discrimination).

266. 582 F.Supp. 75 (W.D.La. 1984).

267. Id. at 77.

268. The court noted as follows:

> The Fifth Circuit found the following facts significant: (1) Congress had authorized the Department of Energy to establish, operate, and maintain underground crude oil storage sites under 42 U.S.C. §6239 . . . ; (2) The contractor engaged to perform the work was merely an instrument to execute the mission of the Department of Energy required by Congress. The court held that the sub-contractor was engaged in part of the usual and customary business of the United States, and, therefore, the plaintiff was barred . . . .

Id. at 78, citing, Thomas v. Calaver Corp., 679 F.2d 416 (1982); also citing, Raelofs v. United States, 501 F.2d 87, 93 (5th Cir.), cert. denied, 423 U.S. 830 (1975); Olveda v. United States, 508 F.Supp. 255, 259 (E.D.Tex. 1981).

269. Stencel Aero Eng'g Corp., 431 U.S. 666.

270. Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983).

271. 28 U.S.C.A. §2674 (West 1965 & Supp. 1989)..

272. 28 U.S.C.A. §1346(b) (West 1976); 28 U.S.C.A. §2672 (West 1965 & Supp. 1989).

273. Wright v. United States, 719 F.2d 1032, 1034-35 (1983) (citations and footnote omitted).

274. See supra pp. 15-18 & accompanying notes.

275. 346 U.S. at 26.

276. Id. at 27.

277. Id. at 28.

278. The Court said:

> Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into

> the "non-governmental--governmental" quagmire that has long plagued the law of municipal corporations. . . . The [FTCA] cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts.

350 U.S. at 65 (footnote omitted). The Court continued by saying:

> Moreover, if the United States were to permit the operation of private lighthouses--not at all inconceivable--the Government's basis of differentiation would be gone and the negligence charged would be actionable. Yet there would be no change in the character of the Government's activity in the places where it operated a lighthouse, and we would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance--the presence of identical private activity.

Id. at 66-67 (footnote omitted). The Court was faced with a similar case involving negligent firefighting in **Rayonier**. The majority opinion described the conflict between **Dalehite** and **Indian Towing** as follows:

> We expressly decided in **Indian Towing** that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when it acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity. To the extent that there was anything to the contrary in the **Dalehite** case it was necessarily rejected by **Indian Towing**.

352 U.S. at 317 (footnotes omitted). The Court held the government liable and reversed. In dissent, Justice Reed said the court of appeals was correct:

> Congress assumed liability "as a private individual under like circumstances." The immunity of public bodies for injuries due to fighting fire was then well settled. . . . Private organizations, except as community volunteers, for fire fighting, were hardly known.

Id. at 321. Interestingly, though he also dissented in **Indian Towing**, in this case he said that that decision presented "a different situation."

279. 525 F.2d 136 (1977).

280. Id. at 138 (citations omitted).

281. See, e.g., Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986); Shaw v. Grumman Aero. Corp., 778 F.2d 736 (11th Cir.), cert. denied, 108 S.Ct. 2896 (1988); McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir.), cert. denied, 464 U.S. 1043 (1984), and cases cited therein; Sales, Government Contract Defense: Sharing the Protective Cloak of Sovereign Immunity after McKay v. Rockwell International Corp., Baylor Law Review, Vol. 37, p. 181 (1985)

282. 309 U.S. 18 (1940).

283. 323 F.2d 580 (9th Cir. 1963).

284. 243 F.Supp. 824 (D.Conn. 1965).

285. Id. at 827.

286. 108 S.Ct. 2510 (1988).

287. This suit was brought as a diversity action.

288. 479 U.S. 1029 (1986).

289. 108 S.Ct. at 2515. The Court continued:

> Here the state-imposed duty of care that is the asserted basis of the contractor's liability (specifically, the duty to equip helicopters with the sort of escape-hatch mechanism petitioner claims was necessary) is precisely contrary to the duty imposed by the Government contract (the duty to manufacture and deliver helicopters with the sort of escape-hatch mechanism shown by the specifications).

Id. at 2516.

290. Id. at 2517 where the Court explained:

> We do not adopt this analysis because it seems to us that the Feres doctrine, in its application to the present problem, logically produces results that are in some respects too broad and in some respects too narrow. Too broad, because if the Government contractor defense is to prohibit suit against the manufacturer whenever Feres would prevent suit against the Government, then even injuries caused to military personnel by a helicopter purchased from stock . . . or by any standard equipment purchased by the Government, would be covered. Since Feres prohibits all service-related tort claims against the Government, a contractor defense that rests upon it should prohibit all service-related tort claims against the manufacturer -- making inexplicable the three

limiting criteria for contractor immunity . . . that the Court of Appeals adopted. On the other hand, reliance on Feres produces (or logically should produce) results that are in another respect too narrow. Since that doctrine covers only service-related injuries, and not injuries caused by the military to civilians, it could not be invoked to prevent, for example, a civilian's suit against the manufacturer of fighter planes, based on a state law tort theory, claiming harm from what is alleged to be needlessly high levels of noise produced by the jet engines. Yet we think that the character of the jet engines the Government orders for its fighter planes cannot be regulated by state tort law, no more in suits by civilians than in suits by members of the armed forces.

291. The Court stated:

> We think that the selection of the appropriate design for military equipment . . . is most assuredly a discretionary function . . . . It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness. And we are further of the view that permitting "second-guessing" of these judgments . . . through state law tort suits against contractors would produce the same effect sought to be avoided by the FTCA exemption. The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs. To put the point differently: It makes little sense to insulate the Government against financial liability for the judgment that a particular feature of military equipment is necessary when the Government produces the equipment itself, but not when it contracts for the production.

108 S.Ct. at 2517-18 (citations omitted). This analysis smacks of judicial legislation, as noted by both Justices Brennan and Stevens in dissent. See 108 S.Ct. at 2520, 2528. It also seems to focus not on whether discretion was actually exercised in selection of the design involved here but rather on the impact of contractor liability on the federal fisc. Though other decisions have clearly stated that cost-benefit analysis indicates that decision-makers exercised discretion, here that analysis was not applied by the people in charge of designing the helicopter but by the Court itself. Moreover, since contractor indemnity or contribution suits against the United States are barred if the underlying claim is made by an active duty servicemember, Stencel here, the effect of

this decision is to sweep government contractors within a statutory exception which, as drafted by Congress and applied heretofore by the courts, applied only to government decision-making. However, as noted above, prior decisions had taken that exact approach as early as 1965. See Dolphin Gardens, 243 F.Supp. at 827.

292. 108 S.Ct. at 2518.

293. One court avoided the issue, as follows:

> At present, we need not reach the question of whether the military contractor defense potentially applies to any product -- a belt buckle or a can of Spam -- supplied to the military. The Grumman A-6 at issue here was clearly part of a "weapons system."

Shaw v. Grumman Aero. Corp., 778 F.2d 736, 740 n.6 (11th Cir. 1985). Another stated:

> A second preliminary inquiry concerns whether the front end loader . . . qualifies as "military equipment." This court does not hesitate to declare that it does. This court notes that such items as pizza machines, jeeps, and tractors have qualified for purposes of the government contractor defense, in addition to weapons of war and defoliants such as Agent Orange.

Tillett v. J.I. Case Co., 756 F.2d 591, 598 (7th Cir. 1985) (citations omitted). And another said:

> We recognize that the term "military equipment" is somewhat imprecise, and that at some point lines will have to be drawn. We need not do so here. The line lies, however, somewhere between an ordinary consumer product purchased by the armed forces--a can of beans, for example--and the escape system of a Navy RA-5C reconnaissance aircraft.

McKay v. Rockwell Int'l Corp., 704 F.2d 444, 451 (9th Cir. 1983).

294. Id. at 450.

295. Id. at 448 n.6.

296. Crawford v. Nat'l Lead Co., Case No. C-1-85-0148 (S.D.Ohio Feb. 13, 1989) (LEXIS, GENFED library, Dist. file), citing Boyle, 108 U.S. at 2514 and Yearsley, 309 U.S. 18.

297. 28 U.S.C.A. §1346(b) (West 1976).

298. 28 U.S.C.A. §2674 (West 1965 & Supp. 1989).

299. 28 U.S.C.A. §2680(k) (West 1965). See also United States v. Spelar, 338 U.S. 217 (1949); Roberts v. United States, 498 F.2d 520 (9th Cir.), cert. denied, 419 U.S. 1070 (1974); Heller v. United States, 605 F.Supp. 144 (E.D.Pa. 1985).

300. Louie v. United States, 776 F.2d 819 (9th Cir. 1985).

301. See, e.g., Caban v. United States, 728 F.2d 68, 72 (2nd Cir. 1983), where the court noted that:

> The reference in §1346(b) to "[t]he law of the place" means the "whole law" of the state where the incident took place. Lambertson v. United States, 528 F.2d 441, 443 (2nd Cir.) (quoting Richards v. United States, 369 U.S. 1, 11 (1962)), cert. denied, 426 U.S. 921 (1976). Applying the state's "whole law" requires that we look to whatever law, including federal law, the state courts would apply in like circumstances involving a federal defendant. Southern Pacific Transportation Co. v. United States, 462 F.Supp. 1193, 1213 (E.D.Cal. 1978). Thus, as we said in [Lambertson] "if the state would look to a state or federal statute in determining the liability of a private person for the tort in question, the same statute will be applied in measuring the conduct of the government." 528 F.2d at 444.

See also the opinion of Judge Cardamone, writing separately but concurring in Caban:

> Under this line of reasoning, courts should apply the law that a local state court would apply, Richardson v. United States, 645 F.2d 731, 732 (9th Cir. 1981), and apply federal law if a state court would do so. Bilderbeck v. United States, 558 F.Supp. 903, 908 (D.Ore. 1982). See also, Hess v. United States, 361 U.S. 314, 318 (1960) (where court applied federal maritime law in an FTCA case). In United States v. Muniz, 374 U.S. 150, 164-65 (1963), the Court found that "the duty of care owed by the Bureau of Prisons to federal prisons is fixed by 18 U.S.C. §4042, independent of an inconsistant state rule." Similarly, in Ingham v. Eastern Airlines Inc., 373 F.2d 227 (2nd Cir.), cert. denied, 389 U.S. 931 (1967), we held that federal FAA regulations established the standard for judging the conduct of FAA air traffic controllers under the FTCA. See Maltais v. United States, 546 F.Supp. 96, 101 (N.D.N.Y. 1982) (application of state statutory strict liability to government of safety responsibility "would encroach on the dictates of the Supremacy Clause."); Southern Pacific Transportation Co. v. United States, 462 F.Supp. 1193, 1215 (E.D.Cal. 1978) (court bound to apply preemptive federal common law in FTCA action).

728 F.2d at 77.

302. See, e.g., Love v. United States Dep't of Agric., 647 F.Supp. 141, 144 (D.Mont. 1986), where the court stated that:

> This principle is, of course, premised upon the fact that the FTCA, being procedural as opposed to substantive in nature, does not create new causes of action but serves to make the United States liable in accordance with local tort law.

303. One court stated:

> The Federal Tort Claims Act does not establish any federal standard of conduct the violation of which would result in liability . . . . "The FTCA was not intended to redress breaches of federal statutory duties" . . . The act does not create any substantive cause of action against the United States; rather, it merely confers a procedural remedy.

Mainstream v. United States Dep't of Agric., 649 F.Supp. 874, 880 (M.D.Ala. 1986), citing Sellfors v. United States, 697 F.2d 1362, 1365 (11th Cir. 1983); Stencel Aero Eng'g, 431 U.S. at 666; Richards v. United States, 369 U.S. 1, 6 (1962); Dalehite, 346 U.S. 15; Feres, 340 U.S. at 142, 146.

304. 674 F.Supp. 1078 (S.D.N.Y. 1987).

305. 854 F.2d 622 (1988).

306. 854 F.2d at 626, citing Jayvee Brand v. United States, 721 F.2d 385, 390 (D.C.Cir. 1980).

307. 854 F.2d at 626-27.

308. See, e.g., Art Metal--USA, Inc. v. United States, 753 F.2d 1151 (D.C.Cir. 1985); Proud v. United States, 723 F.2d 705 (9th Cir.), cert. denied, 467 U.S. 1252 (1984); Jones v. United States, 693 F.2d 1299 (9th Cir. 1982); Simpson v. United States, 652 F.2d 831 (9th Cir. 1981); Ewell v. United States, 579 F.Supp. 1291 (D. Utah 1984).

309. Love, 647 F.Supp. at 145, citing Luts, 685 F.2d 1178, 1184.

310. Moody v. United States, 774 F.2d 150 (6th Cir. 1985), citing Schindler v. United States, 661 F.2d 552 (6th Cir. 1981).

311. Cecile v. United States, 793 F.2d 97 (3rd Cir. 1986), citing, Schindler, 661 F.2d at 560-61.

312. 685 F.2d 1178.

313. Id. at 1182.

314. Id. at 1183.

315. Williams v. United States, 350 U.S. 857 (1955) (per curiam); Dornan v. United States, 460 F.2d 425, 427 (9th Cir. 1972).

316. The court found that this law did not apply:

> The act to which the district court applied its interpretation . . . was the ownership of the dog. Because it found that ownership of a pet was a choice freely made by the base resident, and because that ownership was of no discernible benefit to the Air Force, the court concluded that Harris acted purely for his own benefit.
>
> While we do not dispute these findings, we do not conclude this case turns on Harris' decision to own a dog. The claims of negligence go to Harris' acts or omissions in controlling the dog, and it is to those acts that the scope of employment analysis must be applied.

685 F.2d at 1182.

317. Id. at 1183, citing Craft v. United States, 542 F.2d 1250 (5th Cir. 1976), where the court held that injury resulting from lawn mowing was within the scope of a military members employment because "inadequate performance of those duties would result in military discipline."

318. 685 F.2d. at 1184 (citations omitted).

319. See also Piper v. United States, 694 F.Supp. 618 (E.D.Ark. 1988).

320. 838 F.2d 1280 (D.C. Cir. 1988).

321. The court stated:

> We doubt the adequacy of the Luts rationale. Under Luts, all duties imposed by military regulation, no matter how trivial, could fall within the servicemen's line of duty and thus within the employer--employee relationship. In the unique context of life on a military base, however, the government is much like an old fashioned "company-town. Within this multi-faceted relationship, the military imposes many duties on military personnel, not all of which are plausibly viewed as imposed by the government in its role as employer.
>
> Bolling Air Force Base regulations, for example, require base residents to use certain size pots and pans,

> to replace electrical fuses, and to refrain from smoking in bed. These duties are not imposed by the military in its role as employer and they do not run to the employer's benefit. Rather, they are incidental regulations designed to ensure that the base functions under conditions of common consideration and orderliness that enhance community life; as such, they are designed to benefit all residents of the housing community. Because such duties, although established by military regulations, do not run to the benefit of the employer and are linked only incidentally with the employment relationship, they cannot be said to be discharged within the scope of employment.

838 F.2d. at 1283. As to Judge Bork's comment about company towns, I read this case after coming to the same conclusion while analyzing the Feres doctrine. See supra pp. 21-22 & note 135. Consequently, I researched this phrase using LEXIS attempting to find other FTCA cases containing this term, and to determine if Judge Bork had authored any Feres cases using this analogy. I found none.

322. The court continued by saying:

> Thus, we do not believe that it is possible to place every duty imposed by base regulation within the employer--employee relationship. Instead, whether a breach of military regulations subjects the government to tort liability must depend upon whether analogous duties exist under local tort law. . . .
>
> There seems, moreover, to be no principled limit to the reasoning in Lutz, so that the case would seem to make the government an insurer as to all manner of bizarre incidences. Military regulations typically govern a wide range of . . . activities, touching most aspects of private and public life. To hold the government potentially liable for all damage done by conduct on a military base that violates any one of the many base regulations would expand liability in ways inconsistent with the idea that the FTCA must be strictly interpreted as a limited relinquishment of sovereign immunity.

838 F.2d at 1284.

323. 838 F.2d at 1286-87.

324. 108 S.Ct. 2510.

325. Green v. United States, 530 F.Supp. 633, 642 (E.D.Wisc.), aff'd, 709 F.2d 948 (7th Cir. 1983) (emphasis added).

326. Pesantes v. United States, 621 F.2d 175 (5th Cir. 1980). See also Nott v. United States, Civil Action No. 86-2045, (D.Kan. January 5, 1988) (LEXIS, GENFED library, Dist. file).

327. 621 F.2d at 176.

328. 809 F.2d 1170 (5th Cir. 1987).

329. Id. at 1172.

330. 370 F.Supp. 525 (D.Nev. 1973).

331. Id. at 540.

332. 159 F.Supp. 920 (D.Minn. 1959).

333. 143 F.Supp. 179 (W.D.Pa. 1956).

334. 356 F.2d 92 (1966).

335. Barrett v. United States, 660 F.Supp. 1291, 1297 n.4 (S.D.N.Y. 1987) (emphasis added).

336. Wheat v. United States, 630 F.Supp. 699, 702 (W.D. Tex. 1986), where the court noted that it believed "that the proper standard of medical care in Central Texas in 1978 required that a repeat pap smear be taken within three months."

337. 28 U.S.C.A. §1346(b) (West 1976).

338. 28 U.S.C.A. §2671 (West 1965 & Supp. 1989).

339. Id.

340. Id.

341. Williams v. United States, 105 F.Supp. 208 (N.D.Cal.), aff'd, 215 F.2d 800 (9th Cir.), vacated, 350 U.S. 857, on remand, 141 F.Supp. 851, aff'd, 248 F.2d 492, cert. denied, 355 U.S. 953 (1958). The initial trial court decision, holding that an intoxicated, joy-riding, off duty Army Corporal was not acting within the scope of employment, remained unchanged by either Supreme Court decision. For the same plaintiff's action under the Longshoremen's and Harbor Workers' Compensation Action, 33 U.S.C. §901, et seq, and 42 U.S.C. §1651-54, see, 305 F.2d 699 (9th Cir. 1962).

342. Williams, 248 F.2d at 506 n.6:

> A soldier who is off duty or on a pass is not engaged in the business of the United States. While on pass or leave, one in military service "is at liberty to go where he will during the permitted absence, to employ

his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him."

Citing United States v. Williamson, 23 Wall. 89, 91, 90 U.S. 411, 415 (1874).

343. LePatourel v. United States, 463 F.Supp. 264 (D.Neb. 1978).

344. 28 U.S.C.A. §2671 (West 1965 & Supp. 1989).

345. Cavazos v. United States, 776 F.2d 1263 (5th Cir. 1985).

346. Md. v. United States, 381 U.S. 41 (1965); Rhodes v. United States, 574 F.2d 1179, 1180 n.1 (5th Cir. 1978); Robin Const. Co. v. United States, 345 F.2d 610 (3rd Cir. 1965).

347. Layne, 295 F.2d 433; Bloss v. United States, 545 F.Supp. 102 (N.D.N.Y. 1982); Spain v. United States, 452 F.Supp. 585 (D.Mont. 1978); Misko v. United States, 453 F.Supp. 513, 514 (D.D.C. 1978).

348. Slagle v. United States, 612 F.2d 1157 (9th Cir. 1980).

349. Witt v. United States, 319 F.2d 704 (9th Cir. 1963).

350. 258 F.2d 465 (9th Cir. 1958).

351. The court said:

> Appellants argue . . . [that] the army . . . could have prohibited Pfc. Frehe from travelling by private automobile and could have directed that he travel by some other specific mode of transportation. This argument is not sufficient to support a conclusion that Frehe was acting within the scope of his employment. . . . The ability to control must arise out of the employment relationship. The government's ability to control Pfc. Frehe's movement arose not out of its status as an employer, but by virtue of its military capacity. In our view the necessary element of control relates to the particular functions for which the employee was hired and cannot be supplied by the unique military status. The soldier's obligation to hold himself ready for instant obedience to the commands of his superiors is the concern only of the army and the soldier; this unique obligation is totally unrelated to any conduct affecting these appellants . . . . As an employer, the army could not direct the manner in which Frehe drove his car or its mechanical fitness for the trip. . . . The mode and manner of travel was purely of his own choosing and for his own benefit.

Id. at 470 (footnotes omitted) (emphasis added).

352. Murphey v. United States, 179 F.2d 743 (9th Cir. 1950).

353. The court stated that:

> Here [the driver] was seeking the specified entertainment which would improve his military morale. That he was "directly or indirectly serving his master" in so doing is none the less within the scope of that employment, because he was serving his own desire and that of the other sergeant seeking recreation in taking the latter's two lady friends to the ceremonial.

Id. at 746.

354. Also applying California law, Judge Bone stated that:

> However, it is immaterial whether or not the driver had "permission" or "authority" to drive the truck from the center of town to the dance because in so doing he was merely using the truck for his own personal pleasure and not in any manner fulfilling his duties of employment. Even if he had express permission to use the truck for that purpose his employer would not be liable under recognized uniform respondeat superior rules.

179 F.2d at 747.

355. 363 F.2d 662 (1966).

356. Id at 664.

357. Id. at 664-65.

358. Almost all of those same factors were present in Chapin. The only differences were that the travel in Chapin was under PCS orders, while TDY travel was involved in Romitti, and that the tortfeasor in Chapin was active-duty military while Romitti involved civilian employees. In a more recent case, Hartzell v. United States, 786 F.2d 964 (1986), the Ninth Circuit confronted language in Chapin refusing to consider the tortfeasor's military status:

> In reaching our decision, we refused to consider the military's unique authority over the soldier, finding instead that for purposes of respondeat superior, the status of a member of the military is similar to that of any private employee:
>
> > We discern no basis in the [FTCA] . . . nor in logic for making a distinction which would extend the scope and application of the doctrine . . . beyond that traditionally applied to private employers simply because the federal

> government in its military capacity finds itself in the role of the employer.
>
> . . . . [the] proper means of analyzing torts involving military personnel is to strip the case of "its military overtones, such as, that [the serviceman] during his leave was subject to call to duty, and subject to the . . . Uniform Code of Military Justice . . . .

Id. at 968, citing Chapin, 258 F.2d at 468 and McCall v. United States, 338 F.2d 589, 593 (9th Cir. 1964). See also McSwain v. United States, 422 F.2d 1086 (5th Cir. 1958); Bissell v. McElligott, 369 F.2d 115 (8th Cir. 1966); Cobb v. Kumm, 367 F.2d 132 (4th Cir. 1966); United States v. Eleazer, 177 F.2d 914 (4th Cir.), cert. denied, 339 U.S. 903 (1950). But compare this reasoning to the Feres cases which apply a but for or per se rule. See supra pp. 25, 26 & notes 179, 186.

The Hartzell court looked to the private person standard:

> A private employer does not have the military's right to exercise complete authority over its employees at all times. If we adopted the Hartzells' rationale . . . the United States would be liable for virtually any tort committed by a serviceman, whether he was on-duty, off-duty, or on leave at the time of the incident. This result is clearly inconsistent with the limited waiver of sovereign immunity Congress intended in the FTCA.

786 F.2d at 969, citing Luts, 685 F.2d at 1183; Bissell, 369 F.2d at 118; Chapin, 258 F.2d at 468. Confined to its facts, this case held there was no liability because the military member was on a deviation and on leave. The private person standard was strictly applied. The key was direct right to control the employee's activity at the time the accident occurred and whether the employees duties included the activity involved:

> [T]he unique control which the Government maintains over a soldier has little if any bearing upon determining whether his activity is within the scope of employment.

786 F.2d at 969, citing Bissell, 369 F.2d at 119. The court continued by saying:

> Where, as here, the employee's conduct did not involve a regular and specific military activity, the special characteristics of military employment do not bring the employee's conduct within the scope of his employment for purposes of the FTCA.

786 F.2d at 970.

359. 868 F.2d 332 (9th Cir. 1989).

360. For other cases involving violation of military regulations, see Doggett v. United States, 858 F.2d 555, as amended, 875 F.2d 684 (9th Cir. 1989); Nelson v. United States, 838 F.2d 1280 (D.C.Cir. 1988); Lutz, 685 F.2d 1178; Piper, 694 F.Supp. 614.

361. 868 F.2d at 334 (emphasis added). Previously, the Ninth Circuit had deliberately chosen not to consider "unique military status." Yet it considered this case even though: neither negligent federal employee was employed as a fire fighter; whatever control the government exercised was in no way dissimilar from that exercised over drivers in travelling cases; there was no analysis of a purely private person under state law, since private employers don't provide, and regulate, housing for employees; and, the employees involved were off duty.

On the one hand, this is entirely consistent with Feres: military personnel cannot maintain an action against the government due to government negligence in executing uniquely military functions. On another, the facts clearly show that the injury had nothing to do with military functions.

Here, the court was willing to inquire into the facts and circumstances of the fire, yet the Supreme Court would not do so in Feres. The claimants' status has no logical connection to whatever distinction that can be made. Most importantly, if military status doesn't count in the Ninth Circuit, why does the imperative to prevent fire in military quarters have anything to do with the result?

Compare Merritt v. United States, 332 F.2d 397 (1st Cir. 1964), a case involving a fire in military operated, privately owned quarters caused by a military member smoking in bed. The court held that this activity was not within the scope of his employment and, therefore, the property owner could not recover against the United States.

362. For additional Ninth Circuit cases, see Garrett Freightlines v. United States, 529 F.2d 26 (1976); McCall, 338 F.2d 589; United States v. McRoberts, 409 F.2d 195 (1969).

363. 409 F.2d 1009 (1969).

364. Id. at 1011. See also United States v. Mraz, 255 F.2d 115 (10th Cir. 1958).

365. McSwain, 422 F.2d 1086.

366. Cooner v. United States, 276 F.2d 220 (1960).

367. Hinson v. United States, 257 F.2d 178 (5th Cir. 1958).

368. United States v. Myers, 331 F.2d 591 (1964).

369. O'Brien v. United States, 236 F.Supp. 792 (D.Me. 1964); Whittenberg v. United States, 148 F.Supp. 353 (S.D. Tex. 1956); Satterwhite v. Bocelato, 130 F.Supp. 825 (E.D.N.C. 1955); Purcell v. United States, 130 F.Supp. 882 (N.D.Cal. 1955).

370. The court stated that:

> Thus it is controlling that at the time of this collision, Capt. Wescott was performing a specific duty which had been assigned him to travel to Fort Sam Houston. In executing this order to proceed, he made use of his private automobile with the express authority of the Army. For this the Army bore the expenses which were "necessary in the military service." In so doing he was not going to work, he was then engaged in the performance of the very duties specifically assigned to him, receiving Army pay, subject to military discipline and not on leave. His only choice was the immaterial one of route and means of travel.

Hinson, 257 F.2d at 182 (citation omitted).

371. Which the Hinson court described as "[t]he battle lines here drawn on scope of employment separate the camps into the question in its simplest most graphic form: was Capt. Wescott "going to work" or was he already "at work" in making his way to Texas?" 257 F.2d at 181.

372. Kunkler v. United States, 295 F.2d 370 (5th Cir. 1961); Eleazer, 177 F.2d 914; McGarrh v. United States, 294 F.Supp. 669 (N.D.Miss. 1969); Noe v. United States, 136 F.Supp. 639 (E.D.Tenn. 1956).

373. 530 F.Supp. 633, aff'd, 709 F.2d 1158.

374. As the district court put it:

> Viewing the facts charitably, one could perhaps see that the reason for Dr. Stanford's TDY was . . . to improve Dr. Stanford's surgical skills for the benefit of the Air Force. Being less charitable, one sees the real benefit . . . was to get Dr. Stanford off its hands for a while to prohibit scandal and further dissension among the doctors at Wilford Hall. In short, sending Dr. Stanford to Milwaukee was a good way to avoid a nasty embarrassment to the Air Force.

530 F.Supp. at 641.

375. The court noted that:

> While CVSA may have decided to offer Dr. Stanford a fellowship with the expectation that he would

> contribute something to the group's medical practice in exchange for the training provided him, it is clear that the fellowship was intended to benefit the government and Dr. Stanford more than CVSA. Unlike usual cases of an employee being loaned by his initial employer to do work which the second employer must pay for . . . Dr. Stanford himself sought the unpaid fellowship . . . to improve his surgical skills [and] . . . continued to receive his Air Force salary. . . . [I]t is highly unlikely that the Air Force would have agreed to this arrangement had it not felt it would benefit from it.

709 F.2d at 1163 (citations omitted).

376. Dornan v. United States, 460 F.2d 425.

377. Id. at 429. The dissent argued that the trial court's determination of employment status was a finding of fact and that since the evidence supported either conclusion, the trial court should be affirmed. Judge Choy noted that the following factors rebutted the presumption that the negligent federal employees remained in the employ of the government:

> 1. Willis was doing [the contractor's] work at the time of the accident.
>
> 2. The Government had no idea what work Willis would be doing. It released him temporarily to [the contractor] to do any work.
>
> 3. Willis was ordered to report to [the contractor] and "carry out their instructions and their mission, whatever the mission might be.
>
> 4. What instructions or directions Willis did receive on the job situs came from [the contractor] including the instruction to free the grounded boat.
>
> 5. Willis was not in contact with the Government from the time he left for the temporary assignment through its completion.
>
> 6. Although the actual time he worked for [the contractor] was short, Willis was loaned for as long as he was needed, and after the work ended was told by [the contractor] he would be no longer needed.
>
> 7. He was loaned to do work which was not within the scope of his normal employment.
>
> 8. This case does not involve a rental . . . but involves a gratuitous loan, during an emergency, without any written contract.

460 F.2d at 430.

378. See, e.g., Fries v. United States, 170 F.2d 726 (9th Cir. 1948); Pieter Kiewit Sons v. United States, 345 F.2d 879 (8th Cir. 1965).

379. See, e.g., Doe v. United States, 618 F.Supp. 503 (D.S.C. 1984).

380. Bennett v. United States, 488 F.Supp. 1066 (D.D.C. 1980).

381. 809 F.2d 1170 (5th Cir. 1987).

382. 352 F.2d 477 (5th Cir. 1965).

383. Id. at 480.

384. The court described the location as being "surrounded by wire, locked, inaccessible to unauthorized persons, and guarded at all times by sentries patrolling its perimeter." Voytas v. United States, 256 F.2d 786, 790 (7th Cir. 1958).

385. Id. at 789. In a similar case, the Court of Claims was more emphatic:

> Not by the wildest stretch of imagination could anyone say that McDermott, in taking grenades away from Camp LeJeune when he went on leave, was acting in line of duty, or within the scope of employment, or in furtherance of his master's business.

Gordon v. United States, 180 F.Supp. 591, 594 (Ct.Cl. 1960).

386. 340 U.S. 135. See supra p. 24 & accompanying notes.

387. See Shearer, 473 U.S. 52; Kohn v. United States, 680 F.2d 922 (2nd Cir. 1981).

388. That is, federal employees other than the assailant.

389. 108 S.Ct. 2449 (1988).

390. The Court stated:

> [T]he negligence of other Government employees who allowed a foreseeable assault and battery to occur may furnish a basis for Government liability that is entirely independent of [the assailant's] employment status. By voluntarily adopting regulations that prohibit the possession of firearms . . . and that enquire all personnel to report the presence of any such firearm, and by further voluntarily undertaking to provide care to a

person who is visibly drunk and visibly armed, the Government assumed responsibility to "perform [its] 'Good Samaritan' task in a careful manner.". . . Indeed, in a case in which the employment status of the assailant has nothing to do with the basis for imposing liability . . . it would seem perverse to exonerate the Government because of the happenstance that [the assailant] was on a federal payroll.

Id. at 2455 (citations omitted).

391. 108 S.Ct. at 2456 n.8 (emphasis in original). This comment is curious. Earlier in the opinion, the Court characterized its decision in Munis as being "for negligently allowing the assault to occur." 374 U.S. at 2454. To some degree, hiring, supervision and training are implicated where a prison guard negligently failed to take proper steps that would have prevented an assault from occurring.

392. See, e.g., Josephs v. United States, 85 Civ. 7720 (SWK) (S.D.N.Y. January 21, 1987) (LEXIS, GENFED library, Dist. file), a pre-Sheridan decision where the court noted at page 7:

> Plaintiffs cannot avoid the reach of section 2680(h) by framing their complaint in terms of negligent failure to prevent the assault and battery because section 2680(h) does not merely bar claims for assault or battery but, in sweeping language, it also excludes any claim arising out of assault or battery.

393. 108 S.Ct. at 2454.

394. 28 U.S.C.A. §2671 (West 1965 & Supp 1989).

395. See, e.g., Roberson v. United States, 682 F.2d 714 (9th Cir. 1967); Gowdy v. United States, 412 F.2d 525 (6th Cir. 1959); United States v. Page, 350 F.2d 28 (10th Cir. 1965); Grogan v. United States, 341 F.2d 39 (6th Cir. 1965); Dushon v. United States, 243 F.2d 451 (9th Cir. 1957); United States v. Dooley, 231 F.2d 423 (9th Cir. 1955); Strangi v. United States, 211 F.2d 451 (5th Cir. 1954).

396. 425 U.S. 807 (1976).

397. The Court said that:

> Billions of dollars of federal money are spent each year on projects performed by people and institutions which contract with the government. These contractors act for and are paid by the United States. They are responsible to the United States for compliance with the specifications of a contract or grant, but they are largely free to select the means of implementation. . .

. Similarly, by contract, the Government may fix specific and precise conditions to implement federal objectives. Although such regulations are aimed at assuring compliance with goals, the regulations do not convert the acts of entrepreneurs - or of state governmental bodies - into federal governmental acts.

425 U.S. at 1976-77, citing cf. Jackson v. Metro. Edison Co. 419 U.S. 345 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

398. Logue v. United States, 412 U.S. 521 (1973).

399. McGarry v. United States, 370 F.Supp. 525, 531 (D.Mont. 1973), citing Gowdy, 412 F.2d 525; Roberson, 382 F.2d 714; Page, 350 F.2d 28; Grogan, 341 F.2d 39; Dushon, 243 F.2d 451; Dooley, 231 F.2d 423; Strangi, 211 F.2d 395. McGarry was reversed on other grounds, 549 F.2d 587 ((9th Cir. 1976).

400. 28 U.S.C.A. §2679(d) (West Supp. 1989), The Federal Employees Liability Reform and Tort Compensation Act of 1988, P.L. 100-694.

401. Prior to 1978, jurisdiction over contract claims was both concurrent and exclusive. District courts had jurisdiction over such claims up to $10,000 while the Court of Claims jurisdiction was unlimited. 28 U.S.C. §1346(a)(2), 1491. Under the Contract Disputes Act of 1978, 41 U.S.C. §601, et seq., the Court of Claims now has exclusive jurisdiction over all contract claims. The relevant statutory language excluding ". . . cases sounding in tort . . ." has been retained in amended section 1346(a)(2). See 28 U.S.C.A. §1346(a)(2) (West 1976 & Supp. 1989).

402. 244 F.2d 674 (3rd Cir. 1957).

403. Id. at 296.

404. The court said that:

> The fact that the claimant and the United States were in a contractual relationship does not convert an otherwise tortious claim into one in contract. . . .
> . . . .
> . . . Aleutco could have equally well made out a complaint for breach of contract. . . . While only cases "not sounding in tort" are cognizable in the Court of Claims, the jurisdiction of that court has been sustained where elements of both contract and tort were involved in the claim.

Citing United States v. Huff, 165 F.2d 720 (5th Cir. 1946); Chain Belt Co. v. United States., 115 F.Supp. 701, 127 Ct.Cl. 38 (1939); Kiefer and Kiefer v. Reconstr. Fin. Corp., 306 U.S. 381 (1939). The court continued by saying:

. . . Likewise, as a result of the Tort Claims Act, there is no policy in the law which requires that the forum of the district court be denied a plaintiff who pleads and proves a classic case in tort.

244 F.2d at 678-79 (footnote added).

405. Id. at 680 n.10; 28 U.S.C.A. §2680(h) (West 1965 & Supp. 1989).

406. 313 F.2d. 291 (1963).

407. Id. at 294.

408. Id. at 296.

409. The court distinguished Aleutco as follows:

We do not mean that no action will ever lie against the United States under the Tort Claims Act if a suit could be maintained for a breach of contract based upon the same facts. We only hold that where, as in this case, the action is essentially for breach of a contractual undertaking, and the liability, if any, depends wholly upon the government's alleged promise, the action must be under the Tucker Act.

Id. (emphasis added).

410. Id. at 296.

411. The government asserted that Aleutco had abandoned its property as described by the contract's abandonment clause. That clause required prior notice before resale; since no notice was given, this defense was rejected. 244 F.2d at 680.

The court's distinction seems illusory as the contract in both cases was equally relevant to the tort. The court was also preoccupied with forum shopping; that is, federal law applies in contract cases while state law applies under the FTCA.

412. 345 F.2d 879 (1965).

413. Id. at 880.

414. Id. at 883 (emphasis in original).

415. Id. (emphasis in original).

416. See, e.g., Bird and Sons, Inc. v. United States, 420 F.2d 1051 (Ct.Cl. 1970); Aetna Ins. Co. v. United States, 327 F.Supp. 865 (E.D. La. 1971). One court commented that:

> "It is settled law that the Disputes Clause applies only to the extent that complete relief is available under a specific contract adjustment provision.' United States v. Utah Construction and Mining Co., 384 U.S. 394, 402, 86 S.Ct. 1545, 1550 (1966)."
> . . . In Bird, the court said with respect to Pieter Kiewit Sons: However, that decision was rendered before the Supreme Court's decision in Utah, supra, which specifically rejected this view, and is thus of no precedential value.

Aetna, 327 F.Supp. at 866-67, quoting Bird, 420 F.2d at 1054.

417. Len Co. and Assoc. v. United States, 385 F.2d 438, 441-2, 181 Ct.Cl. 29, 36 (1957). The Ninth Circuit has addressed this issue in several cases subsequent to Woodbury. Almost all distinguish this decision and adopt the reasoning of Aleutco. See Fort Vancouver Plywood Co. v. United States, 747 F.2d 547 (1984)--allegation that the United States negligently managed a set fire that destroyed stacked timber purchased by plaintiff under government contract states a claim under the FTCA; Martin v. United States, 649 F.2d 701 (1981)--FTCA recovery allowed for negligent contract performance by the United States; Walsh v. United States, 672 F.2d 746 (1982)--allegations that the United States failed to comply with the terms of an easement states a claim under the FTCA. One decision appeared to intentionally step away from Woodbury. The court noted that:

> The court in Walsh rejected the notion that an FTCA claim cannot be maintained when a contract claim is also possible, citing Aleutco with approval. . . . The fact that a contract claim may also have existed did not detract from the existence of jurisdiction under the FTCA.
> . . . .
>
> Liability [here] is not established exclusively by the contract, so Fort Vancouver is not limited by the holding in Woodbury. And, Martin and Walsh would arguably permit the claim under the FTCA even if liability did arise because of contract obligations. Moreover, according to Walsh, it is irrelevant that a contract action might also be possible based on the same facts.

Fort Vancouver Plywood Co., 747 F.2d at 551-52. The district court decision was reversed. It concluded that it lacked jurisdiction because the claim exceeded $10,000. Under the previous version of 28 U.S.C. §1346(a)(1) this was true; however, that statute was amended 1 November 1978 to exclude such claims from the district court's jurisdiction. This contract was executed in 1977 but the opinion didn't discuss the date of the fire or the Contract Disputes Act of 1978. A recent decision, however, rejected an

attempt to imply a tort law duty of good faith in a contract setting. The court stated that the issue is difficult:

> We have recognized the increasing difficulty of distinguishing tort claims from contract claims for purposes of Tucker Act jurisdiction. . . . In an era in which the obligations attaching to private consensual undertakings are increasingly defined by reference to public values, the distinction between tort and contract is often quite murky. . . . Nevertheless, the Tucker Act requires that we draw the line, and we think appellants' action, which essentially seeks to imply a "good faith" term into a government contract by operation of state law, must be deemed contractual in nature.

LaPlant v. United States, 872 F.2d 881, 885 (1989) (citations and footnotes omitted).

418. 28 U.S.C.A. §2680(a) (West 1965 & Supp. 1989). See supra pp. 15-20 & accompanying notes.

419. See, e.g., 28 U.S.C.A. §2680(h) (West 1965 & Supp. 1989). See cases cited supra p. 51 (assault and battery) and p. 84 (misrepresentation).

420. See supra pp. 21-22.

421. 28 U.S.C.A. §1346(b) (West 1976); 28 U.S.C.A. §2671 (West 1965 & Supp. 1989).

422. 28 U.S.C.A. §2680(h) (West 1965 & Supp. 1989).

423. 28 U.S.C.A. §2679(b)(2)(A) (West Supp. 1989).

424. See, e.g., Gasman v. United States, 768 F.2d 1263 (11th Cir. 1985) (involving the Swine Flu Act); Daniels v. United States, 704 F.2d 587 (9th Cir. 1983).

425. 793 F.2d 964 (8th Cir. 1985).

426. Id. at 968, quoting Ducey v. United States, 713 F.2d 504, 515 (9th Cir. 1983).

427. 793 F.2d at 968.

428. Ducey v. United States, 830 F.2d 1071 (9th Cir. 1987).

429. 612 F.Supp. 592 (C.D.Ill. 1985).

430. The court stated that:

> Therefore, the Government, in creating this relationship with citizens . . . also creates a duty for itself to

develop orderly procedures for dealing with emergencies. It is imperative to have such a plan in place because in such situations there is little time for reflection. Priorities should be established before an emergency arises; otherwise personnel are unprepared to deal with them.

612 F.Supp. at 596.

431. Id. (emphasis added). A contributing cause was plaintiffs' decedent's own negligence. The evidance showed that he had taken photographs of the rising flood but failed to evacuate.

432. 642 F.Supp. 1310 (E.D.Cal. 1986).

433. The court discussed the issue as follows:

> The Government has shown that the National Park Service had formulated a policy of keeping signs in the parks to a very minimum, such policy having been arrived at after very high level debate. A sign committee had been appointed . . . as required by National Policy, which was to recommend to the Superintendent of the park what signs should be posted. The committee had determined that no signs would be posted unless a manifest need had been demonstrated. While posting of warning signs is but one manner of warning, it clearly demonstrates that any type of warning would require the exercise of judgment and discretion by the park service. . . . A review of the decision, or of failure to make such a decision, would encroach into the decision-making process of the park service. The discretionary function exception is intended to protect this process, and the courts are barred from reviewing the same in a tort action.

Id. at 1313.

434. 712 F.Supp. 1506 (D.Kan. 1989).

435. Id. at 1513-14.

436. Gen. Pub. Util. Corp. v. United States, 745 F.2d 239 (3rd Cir. 1984).

437. Begay v. United States, 591 F.Supp. 991 (D.Ariz. 1984), aff'd, 768 F.2d 1059 (9th Cir. 1985). But see, Merklin v. United States, 788 F.2d 172 (3rd Cir. 1986), which reversed a district court's grant of summary judgment that the discretionary function exception barred an action involving, inter alia, allegations of failure to warn.

438. Allen v. United States, 816 F.2d 1417 (10th Cir. 1987); In re: Consol. United States Atmospheric Testing Litig., 820 F.2d 982 (9th Cir. 1987).

439. Piechowicz v. United States, 685 F.Supp. 486 (D.Md. 1988).

440. Fairchild Republic Co. v. United States, 712 F.Supp. 711 (S.D.Ill. 1988).

441. See, e.g., Cole v. United States, 755 F.2d 873 (11th Cir. 1985); Seveney v. United States, 550 F.Supp. 653 (D.R.I. 1982); Everett v. United States, 492 F.Supp. 318 (S.D.Ohio 1980); Thornwell v. United States, 471 F.Supp. 344 (D.D.C. 1979). But see, Allen, 816 F.Supp. 1417, and Atmospheric Testing Litig., 820 F.2d 982, which applied the discretionary function exception.

442. Thornwell, 471 F.Supp. at 352.

443. Stanley v. Cent. Intelligence Agency, 639 F.2d 1146 (5th Cir. 1981).

444. Brown, 348 U.S. 110.

445. Targett v. United States, 551 F.Supp. 1231 (N.D.Cal. 1982). See infra notes 451-53.

446. Heilman v. United States, 731 F.2d 1104 (3rd Cir. 1984); Gaspard v. United States, 713 F.2d 1097 (5th Cir.), cert. denied, 104 S.Ct. 2353 (1984); Lombard v. United States, 690 F.2d 215 (D.C.Cir.), cert. denied, 462 U.S. 1118 (1983); Laswell v. Brown, 683 F.2d 261 (8th Cir.), cert. denied, 459 U.S. 1210 (1983).

447. 731 F.2d 1104.

448. Id. at 1107.

449. Id. at 1107-08.

450. 348 U.S. 110.

451. 757 F.2d 1016 (9th Cir.), cert. dismissed, 473 U.S. 934 (1985).

452. Id. at 1024 (emphasis added).

453. For example, one court said that:

> . . . the crucial inquiry is whether the purported conduct . . . giving rise to plaintiff's cause of action occurred while the injured party was still a member of the armed forces.

Cole, 755 F.2d at 877, citing Heilman, 731 F.2d at 1107; Broudy v. United States (Broudy II), 722 F.2d 566, 570 (9th Cir. 1983); Gaspard, 713 F.2d at 1101; Lombard, 690 F.2d at 220; Stanley, 639 F.2d at 1154. The same court stated that:

> . . . by asserting the novel claim that the government's negligent failure to warn materialized after Cole's discharge when the government's knowledge concerning the hazards of radiation increased sufficiently to give rise to a new duty.

Cole, 755 F.2d at 876 (emphasis in original). Another said:

> The later negligence is a separate wrong, a new act or omission occurring after civilian status is attained; the perpetrators of this wrong must be held accountable for their conduct.

Everett, 492 F.Supp. at 325, quoting Thornwell, 471 F.Supp. at 352. In Everett, soldiers were ordered to march through an area in which an atomic bomb had been detonated less than an hour before. The march occurred in 1953--three years after the Supreme Court announced its decision in Feres. As a military lawyer, I cannot help but wonder whether military lawyers were consulted regarding this plan. Another court stated:

> We think that Feres focuses not upon when the injury occurs or when the claim becomes actionable, but rather the time of, and the circumstances surrounding the negligent act.

Thornwell, 471 F.Supp. at 351, quoting Henning v. United States, 446 F.2d 774, 777 (3rd Cir. 1971), also citing Hungerford v. United States, 192 F.Supp. 581 (N.D.Cal.), rev'd on other grounds, 307 F.Supp. 99 (9th Cir. 1962). In Thornwell, Judge Richey was not impressed with the government's activities:

> [His] transformation to civilian status, however, did not free Mr. Thornwell from the wrongs inflicted by his alleged tortfeasors. Despite his efforts to ascertain the cause or causes of his condition of ceaseless misery, the defendants deliberately concealed from him the facts and circumstances of the drug experiment . . . Even after the [DOD] had assured Congress that the facts of LSD testing would be disclosed to all subjects of the experiments, Mr. Thornwell remained uninformed about his own participation.

471 F.Supp. at 346. And another said that:

> In an attempt to circumvent Feres, however, the Executors seek recovery . . . rather for the Government's failure to warn . . . which allegedly occurred subsequent to his discharge.

Heilman, 731 F.2d at 1107 (emphasis by the court).

454. 28 U.S.C.A. §2680(h) (West 1965 & Supp. 1989).

455. See infra pp. 84-90.

456. 341 F.2d 33 (6th Cir. 1965).

457. Id. at 43.

458. Id., citing 225 F.Supp. at 822-26.

459. 412 F.2d. 525 (6th Cir. 1969).

460. Id. at 529, citing Grogan, 341 F.2d at 42.

461. 412 F.2d 749 (10th Cir. 1969).

462. Id. at 751.

463. 660 F.2d 1136 (6th Cir. 1981). See also Russell v. United States, 763 F.2d 786 (10th Cir. 1985); Bernitsky v. United States, 620 F.2d 948 (3rd Cir.), aff'g 463 F.Supp. 1121 (E.D. Pa.), cert. denied, 449 U.S. 870 (1980).

464. 482 F.Supp. 432, 436-37 (W.D.Ky. 1979).

465. The court said that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to third persons for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> a. his failure to exercise reasonable care increases the risk of such harm, or
>
> b. he has undertaken to perform a duty owed by the other to the third person, or
>
> c. the harm is suffered because of reliance of the other or the third person upon the undertaking.

660 F.2d at 1142 citing RESTATEMENT (SECOND) OF TORTS, §324A (1965).

466. While it is true that, taken separately, the risk of rollover was the same on the day before, the day of, and the day after the accident, one could argue that the cumulative risk was increased as a result of the extension. That is, for every additional accident-free day, the risk increased. And, although the Act placed primary responsibility on miners and operators, the miners' ability to correct a safety violation is largely illusory and is hardly equivalent to that of the operators. Coal miners probably do not study complicated federal statutes and regulations--even if they had, they had no incentive to act because the government had already found a violation and issued citations. The operators were in a superior position--they have power over the money supply and either actual or imputed knowledge of the violation. The opinion is unpersuasive "[t]he purpose of the Act was declared to be the establishment of mandatory health and safety standards for coal miners and 'to require that each operator of a coal mine and every miner in such mine comply with such standards . . . .'" 660 F.2d at 1143 (emphasis added)(original emphasis omitted). But someone has to be the enforcer. Surely Congress didn't intend, by enacting this statute, for coal companies to continue to self-regulate; this appears especially clear when the Act uses mandatory language like "require", "each operator", "every miner", and "comply".

467. 715 F.2d 1206 (7th Cir.), vacated and remanded, 469 U.S. 807, on remand, 755 F.2d 551 (1985).

468. The court reasoned that:

> The Supreme Court has not comprehensively defined the scope of the "discretionary function" exception, other than to note that it "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion. . . ." The great weight of authority suggests that where, as here, the disputed conduct consists of merely implementing and enforcing mandatory regulations, the requisite halo of policy-making is not present.
> . . . .
>
> Here, however, the applicable regulations made clear that there was only one enforcement action available upon discovery of the conveyor's condition: the abatement order. . . . If the nearly automatic issuance of the citation here was considered to be a "discretionary" function, it would be hard to imagine any governmental activity which would be actionable under the FTCA.

715 F.2d at 1213-1214 (citations omitted).

469. 469 U.S. 807.

470. 755 F.2d 551.

471. Cunningham v. United States, 786 F.2d 1445, 1447 (9th Cir. 1986).

472. Cordiero v. United States, 698 F.Supp. 373 (D.Mass. 1988).

473. 790 F.2d 688 (8th Cir. 1986).

474. 679 F.2d 736 (8th Cir. 1982), reh'g denied.

475. Barron v. United States, 473 F.Supp. 1077 (D.Haw.), aff'd, 654 F.2d 644 (1981).

476. 679 F.2d at 741 (citations omitted).

477. Gober v. United States, 778 F.2d 1552 (11th Cir. 1986), where the court noted:

> The Government was under no contractual obligation to inspect the press, and, under Alabama law, the mere leasing of the machine did not give rise to such an obligation. . . . The only way the Government could be liable given the terms of the lease agreement in this case would be if the Government had actually inspected the press and negligently failed to discover the recycling defect.

Id. at 1555-56 (citations omitted).

478. 784 F.2d 942 (9th Cir. 1986).

479. The court noted that:

> Thus, Harmon's [previous] theft and the existence of dangling wires must have gone unnoticed during at least fifteen area security inspections for the government to have been unaware of the tampering. Government employees, who inspected the area between one and four times daily, reasonably should have been aware of Harmon's tampering.

Id. at 944.

480. Id. at 943 n.2.

481. Collins v. United States, 783 F.2d 1225 (9th Cir. 1986).

482. 649 F.2d 701 (1981).

483. See infra pp. 80-81 accompanying notes.

484. 649 F.2d at 704.

485. Id. at 705.

486. 163 F.Supp. 947 (S.D. Ala. 1958).

487. Id. at 950.

488. 473 F.2d 714 (5th Cir. 1973).

489. Id. at 716 n.1.

490. 769 F.2d. 1523 (11th Cir. 1985).

491. The court stated:

> . . . it is clear that there is nothing to suggest that all design decisions are inherently "grounded in social, economic, and political policy." . . .
>
> We turn next to an examination of those cases discussing negligent design and the discretionary function exception. . . . [S]ocial, economic, and political policy may significantly influence a design decision and thus insulate that decision from judicial scrutiny . . . . [but] in the absence of such a policy decision, the Corps' engineers must be held to the same professional standards of reasonableness and due care that a private engineer faces when he plies his trade.

Id. at 1531 (emphasis in original).

492. Id. at 1536-7.

493. 730 F.2d 1434 (11th Cir. 1984).

494. Id. at 1437.

495. 656 F.Supp. 25 (M.D.Pa. 1986).

496. Id. at 31 n.1, 32 n.2, citing, Feyers v. United States, 742 F.2d 1222 (6th Cir. 1984), and Maltais, 546 F.Supp. 96, 101 (N.D.N.Y. 1982), aff'd, 727 F.2d 1442 (2nd Cir. 1983). In Maltais, the district court noted:

> It is well settled that the contractual reservation of the right to stop work does not in itself create a duty in the Government. Alexander v. United States, 605 F.2d 828 (5th Cir. 1979); Fisher v. United States, 441 F.2d

1288 (3rd Cir. 1971); Jennings v. United States, 530 F.Supp. 540 (D.D.C. 1981). In other words, the mere fact the [the government] retained the right to stop work . . . for [contractor] failure to comply with safety regulations is not enough to change [its] status as an independent contractor to that of an agent of the United States for purposes of the [FTCA].

546 F.Supp. at 101 (emphasis added).

497. 656 F.Supp. at 31 n.1, quoting Ford v. Am. Motors Corp., 770 F.2d 462, 465 (5th Cir. 1985).

498. 588 F.2d 403 (3rd. Cir. 1978).

499. The discretionary function applied because the decision:

> . . . involve[d] balancing the costs . . . of providing detailed safety instructions and performing detailed research and testing to determine what precautions are needed . . . against the possibility that the contractor will not effectively carry out its delegated safety responsibility.

656 F.Supp. at 33.

500. Id. (emphasis added).

501. Ala. Elec. Coop., 769 F.2d at 1529-31, quoting Griffin v. United States, 500 F.2d, 1059, 1066 (3rd Cir. 1974), a case involving negligence concerning flu vaccine:

> The judgment, however, was that of a professional measuring neurovirulence. It was not that of a policy-maker promulgating regulations by balancing competing policy considerations in determining the public interest. At issue was a scientific, but not policy-making, determination as to whether each of the criterion listed in the regulation was met and the extent to which each such factor accurately indicated neurovirulence. DBS' responsibility was limited to merely executing the policy judgments of the Surgeon General. It had no authority to formulate new policy . . .

769 F.2d at 1529-30. The court noted several cases involving design issues: Moyer v. Martin Marietta Co., 481 F.2d 585 (5th Cir. 1973); United States v. DeCamp, 478 F.2d 1188 (9th Cir.), cert. denied, 414 U.S. 924 (1973); United States v. Hunsucker, 314 F.2d 98 (9th Cir. 1962); Medley v. United States, 480 F.Supp. 1005 (M.D.Ala. 1979); Stanley v. United States, 347 F.Supp. 1088 (D.Me.), vacated on other grounds, 476 F.2d 606 (1st Cir. 1973); Swanson v. United States, 229 F.Supp. 217 (N.D.Cal. 1964); Jamison, 163 F.Supp. 947.

502. See, e.g., Lather v. Beadle Cty., 879 F.2d 365 (8th Cir. 1989).

503. One court said that:

> Government employees who undertake periodic medical review of social security cases to determine continued eligibility for benefits are necessarily engaged in the exercise of professional judgment and the discretionary application to a particular case of a system of "administrative decisions grounded in social, economic, and political policy.". . . This type of decisionmaking requires more than mere rote application of eligibility standards and involves discretionary acts which are protected from suit by section 2680(a).

Pierce v. United States, 804 F.2d 101, 102 (7th Cir. 1986), quoting, Varig Airlines, 467 U.S. at 814.

504. 769 F.2d at 1526.

505. Boyle, 108 S.Ct. 2510. See infra pp. 38-40.

506. Shearer, 473 U.S. at 52.

507. Sheridan, 108 S.Ct. at 2456 n.8 (emphasis by the Court).

508. See, e.g., Miele v. United States, 800 F.2d 50 (2nd Cir. 1986); United States v. Shively, 345 F.2d 294 (5th Cir. 1965); Underwood v. United States, 356 F.2d 92 (5th Cir. 1966); Panella v. United States, 216 F.2d 622 (2nd Cir. 1954); Munis, 473 U.S. 150.

509. Underwood v. United States, 356 F.2d 92 (5th Cir. 1966).

510. The court commented that:

> Under the circumstances of the present case, we are left in no doubt that negligently releasing Dunn to duty which gave him access to weapons, and negligently permitting Dunn to draw the .45 caliber pistol and ammunition with which he shot and killed his wife were proximately connected with Mrs. Dunn's death.

Id. at 99.

511. Bennett v. United States, 803 F.2d 1502 (9th Cir. 1986).

512. 662 F.2d 219 (4th Cir. 1981).

513. 479 F.2d 804 (9th Cir. 1973).

514. Id. at 809-10.

515. **McGarry**, 549 F.2d 587, 590.

516. **Id.**

517. The court said:

> This need not as matter of law entail presence of an AEC inspector on each occasion of work performed in the neighborhood of the power line. If, here, AEC had made regular examinations to ascertain practices being followed by [the contractor], and was reasonably satisfied from its examination that appropriate guidelines were being followed, this may well have been found by the trier of fact to suffice. No such examination was conducted here and the district court found that the AEC had failed to exercise reasonable or any care to see that proper safety precautions were taken by [the contractor] with reference to work performed in the neighborhood of the power line.

Id. at 590-91.

518. **Id.** at 591.

519. 473 F.Supp. 1077 (D.Haw.), **modified on other grounds**, 654 F.2d 644 (9th Cir. 1981).

520. The court said that:

> . . . the Navy had a substantial organization in place to administer this contract and to insure compliance by the contractor, and its personnel were actively engaged in these tasks.
>
> The record shows that the government personnel responsible for this project . . . had reached the conclusion shortly after work began that the contractor's performance of its safety obligations under the contract, particularly relating to shoring, was grossly deficient and could be treated as a breach of contract. . . . The evidence of further violations and of a general disregard by the contractor of its safety obligations continued to accumulate through April 1976. Nothing ever occurred which should have led the Navy to a different conclusion.

473 F.Supp. at 1084.

521. 749 F.2d 1222 (6th Cir. 1984).

522. **Id.** at 1227.

523. **See cases cited in Feyers**, 749 F.2d at 1226-27.

524. Emelwon v. United States, 391 F.2d 9 (5th Cir. 1968).

525. 610 F.Supp. 86 (D.Colo. 1985).

526. See supra pp. 71-72.

527. See, e.g., Bennett, 803 F.2d 1502.

528. Scanwell Laboratories, Inc. v. Thomas, 521 F.2d 941 (D.C.Cir. 1975); Gowdy, 412 F.2d 525; Toole, 443 F.Supp. 1204.

529. 488 F.Supp. 1066 (D.D.C. 1980).

530. Id. at 1070.

531. Id.

532. Id. at 1072.

533. Id. at 1073.

534. Judge Greene was not impressed by the government's conduct:

> The depressing saga of confusion and inefficiency began when the government, through one of its agencies, determined that housing code violations existed on plaintiff's property and demanded that she take remedial action. Another agency promptly offered and granted her a loan under a widely-publicized rehabilitation program, but to implement its action it selected contractors who were incompetent, corrupt, or both. For over a year thereafter, a number of public employees induced plaintiff to authorize payments at regular intervals, falsely assuring her that the work on the project was being carefully monitored and was proceeding on schedule. Eventually, the project ran out of funds, but even then the situation could still have been saved by a relatively small $17,000 grant, but another agency of the government adamantly refused to approve this expenditure.
>
> Not unexpectedly, after construction on the by now unoccupied premises ceased, vandals began their work, and it was decided that the property had to be boarded up. Instead of paying for the barricading job, or at least allowing plaintiff's still solvent loan account to be charged for the necessary amount, the government, to add insult to injury, assessed her $1,145 for securing the premises at a time when they had already been gutted. Finally, yet another arm of government proclaims that all of this is truly unfortunate but that for a variety of reasons, it is not the government but Mrs. Melton who must bear the loss. The Court disagrees, and finds for

the plaintiff. Judgment will be entered in the amount of $121,411.

488 F.Supp. at 1074-75 (footnotes omitted).

535. **See infra** pp. 90-91.

536. 787 F.2d 518 (10th Cir. 1986).

537. 672 F.2d 746 (9th Cir. 1982).

538. 672 F.2d at 749.

539. **See supra** pp. 80-81.

540. 672 F.2d at 751.

541. **Id.** n.4.

542. 775 F.2d 132 (6th Cir. 1985).

543. **Id.** at 134.

544. In a rather curt decision on remand, the district court came to the same conclusion, on perhaps a more well developed factual record. **See** 650 F.Supp. 434 (S.D.Ohio 1986).

545. 775 F.2d at 145.

546. 347 F.Supp. 1088 (D.Me.), **vacated on other grounds**, 476 F.2d 606 (1st Cir. 1973).

547. **Id.** at 1094. This finding was the reason the court of appeals vacated. It found that the contractor was responsible for safety and that it was not foreseeable that the contractor would hire inexperienced personnel.

548. **Id.** at 1096.

549. McMichael v. United States, 751 F.2d 303 (7th Cir. 1985); **Barron**, 654 F.2d 644; **McGarry**, 549 F.2d 587; **Thorne**, 479 F.2d 804; **Emelwon**, 391 F.2d 9. The **McMichael** court discussed this issue as follows:

> . . . one who hires an independent contractor to do extra-dangerous or ultrahazardous work has a duty to exercise reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury from the work. This liability may be imposed on the United States as an employer, and it is not vicarious or strict liability, but rather a function of the employers own negligence.

751 F.2d at 309-10.

550. Id. at 678-79.

551. 871 F.2d 1488 (9th Cir. 1989).

552. 313 F.2d 291.

553. Preston v. United States, 696 F.2d 528 (7th Cir. 1982), reh'g denied.

554. Krohn v. United States, 578 F.Supp. 1441 (D.Mass. 1983).

555. Fort Vancouver Plywood, 747 F.2d 547.

556. United States v. Ein Chem. Corp., 161 F.Supp. 238 (S.D.N.Y. 1958).

557. Alliance Assurance Co. v. United States, 252 F.2d 529 (2nd Cir. 1958), holding that 28 U.S.C. §2680(c) applied only to temporary "conversions" not permanent loss of property in possession of the Customs Service. But see Kosak v. United States, 679 F.2d 306 (3rd Cir.), aff'd, 465 U.S. 848 (1984).

558. 646 F.Supp. 223 (D.Mont. 1986).

559. Id. at 228 (citation omitted).

560. Coffey v. United States, 626 F.Supp. 1246 (D.Kan. 1986).

561. Verma v. United States, Civil No. 87-2294 (D.D.C. July 24, 1989) (LEXIS, GENFED library, Dist. file).

562. The quoted portion of the legislative history follows:

> MR. HOLTZOFF, Of course, the great majority of the claims that would be cognizable under this proposed law would undoubtedly be covered by the term "negligent" or "negligence." The Government might be saved from some claims that might be difficult to defend, if the words "wrongful act" are included.
>
> SENATOR DANAHER, "Or omission."
>
> MR. HOLTZOFF, "Omission" would probably be covered by the word "negligence." I am more concerned with the words "wrongful act." Suppose you have a question of trespass. If you leave out the words "wrongful act," it might be held that trespass was omitted from the bill.
>
> SENATOR DANAHER, Various types of what might be called "wrongful acts" are [excluded] in subsection g of section 303.

MR. HOLTZOFF, Some types of "wrongful acts" and "trespass" are not enumerated, you will observe.

Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., 43-44.

563. 346 U.S. at 45.

564. 76 F.Supp. 498 (D.Mass. 1948).

565. 194 F.2d 762 (10th Cir. 1952).

566. 194 F.2d at 763.

567. 351 U.S. 173 (1956).

568. Plaintiffs were described by the Court as follows:

> Petitioners are wards of the Government. They have lived from time immemorial in stone and timber hogans on public land in San Juan County, Utah. This bleak area . . . is directly north of the Navajo Indian Reservation. While some Indian families from the reservation come into the area to graze their livestock, petitioners claim to have always lived there the year round. They are herdsmen and for generations they have grazed their livestock on this land. They are a simple and primitive people. Their living is derived entirely from their animals, from the little corn they are able to grow in family plots, and the wild game and pine nuts that the land itself affords. The District Court found that horses, as petitioners' beasts of burden and only means of transportation, were essential to their existence.

351 U.S. at 174.

569. 220 F.2d 666 (10th Cir. 1955), reh'g denied.

570. The Court was somewhat critical of the activities involved:

> Furthermore, the record is replete with evidence that . . . government agents actually did know that the horses belonged to petitioners and had not been abandoned. The District Court found that, "said agents knew beyond any possible doubt to whom said horses belonged"; that "the said agents and employees of defendant knew these brands to be the brands used by plaintiffs as well as they knew that the horses belonged to plaintiffs"; and concluded that the horses "were used daily in the performance of the work of their owners, the plaintiffs, and this was well known by defendant's said agents and employees."

351 U.S. at 179.

571. The Court stated that: "The first portion of section 2680(a) cannot apply here, since the government agents were not exercising due care in their enforcement of the federal law. 'Due care' implies at least some minimal concern for the rights of others." 351 U.S. at 181.

572. 351 U.S. at 181.

573. Anderson v. United States, 259 F.Supp. 148 (E.D.Pa. 1966).

574. Simons v. United States, 413 F.2d 531 (5th Cir. 1969), reh'g denied.

575. Where the Court stated:

> . . . there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected in the District Court's finding that the [fertilizer] constituted a nuisance . . . . [T]he Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. So it is our judgment that liability does not arise by virtue of either the United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra hazardous" activity.

346 U.S. at 44-45 (emphasis added).

576. United States v. Nicolet, Civil Action No. 85-3060 (E.D.Pa. December 31, 1986) (LEXIS, GENFED library, Dist. file).

577. Lemaire, 76 F.Supp. 498, which held that a plaintiff's complaint of continuing nuisance and trespass was not barred by the statute of limitations.

578. 620 F.Supp. 374 (E.D.N.Y. 1985).

579. Id. at 379 n.2.

580. W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser & Keeton on Torts, 616 (5th Ed. 1984).

581. Id. at 624.

582. Id. at 618.

583. 668 F.2d 454 (10th Cir. 1981).

584. Id. at 456.

585. 297 F.Supp. 143 (D.Md.), aff'd, 318 F.2d 718 (4th Cir. 1963) (per curiam).

586. 178 F.Supp. 516 (1959).

587. 291 F.2d 880 (4th Cir. 1961).

588. 207 F.Supp. at 144-45.

589. 318 F.2d 718 (per curiam).

590. 366 U.S. 696 (1961).

591. Id. at 700.

592. Id. at 701.

593. 281 F.2d 596 (4th Cir. 1960).

594. 366 U.S. at 701-02.

595. Hall v. United States, 274 F.2d 69 (10th Cir. 1959).

596. Id. at 71 n.13, citing Anglo-Am. & Overseas Corp. v. United States, 242 F.2d 236 (2nd Cir. 1957) where tomato paste was imported into the U.S. after federal officials had determined it met FDA standards. Upon delivery, federal officials again inspected, found that it did not meet standards and ordered the paste destroyed. The claim was barred.

597. 274 F.2d at 71, citing Indian Towing, 359 U.S. at 68.

598. 460 U.S. 289 (1983).

599. Neal v. Bergland, 489 F.Supp. 512 (E.D.Tenn. 1980).

600. 646 F.2d 1178 (1981).

601. 460 U.S. at 296.

602. Id. at 297 (emphasis added).

603. Id.

604. The Court stated that:

> Common to both the misrepresentation and the negligence claim would be certain factual and legal questions, such as whether FmHA used due care in inspecting Neal's home while it was under construction. But the partial overlap between these two tort actions does not support the conclusion that if one is excepted . . . the other must be as well.

Id. at 298 (emphasis added).

605. See Frigard v. United States Cent. Intelligence Agency, 862 F.2d 201 (9th Cir.), cert. denied, 109 S.Ct. 2448 (1989), where the Court held that even where the CIA misrepresented its participation in a company in which plaintiffs invested, causing them to lose funds, the misrepresentation exclusion applied.

606. 680 F.2d 922 (2nd Cir. 1982).

607. Id. at 926, citing Green v. United States, 629 F.2d 581, 583-85 (9th Cir. 1980).

608. This portion of the claim was barred by Feres.

609. Described by the court as follows:

> . . . they contend that the Army coerced them into agreeing to an autopsy, although . . . [it] violated their religious beliefs, negligently advised them that their son died in an accidental shooting, negligently lost or destroyed their son's personal effects, negligently failed to provide an honor guard for their son's burial, wrongfully sent a copy of their son's autopsy report complete with photographs to their home, wrongfully continued to send recruitment literature to their home, and wrongfully prevented servicemen from discussing their son's death with them.

680 F.2d at 924.

610. Id. at 926.

611. 629 F.2d 581.

612. The Bureau of Indian Affairs (BIA) and United States Forest Service (USFS).

613. 629 F.2d at 584, citing, City and Cty. of San Francisco v. United States, 615 F.2d 498, 504-05 (9th Cir. 1980); Preston v. United States, 596 F.2d 232 (7th Cir. 1979); Cargill v. United States, 426 F.Supp. 127 (D.Minn. 1976).

614. 626 F.2d 1278 (5th Cir. 1980).

615. Hall, 274 F.2d 69.

616. 626 F.Supp. at 1283 (citations omitted).

617. Carolinas Cotton Growers Assoc. v. United States, 785 F.2d 1195 (4th Cir. 1986).

618. Id. at 1199.

619. Cross Bros. Meat Packers v. United States, 705 F.2d 682 (3rd Cir. 1983).

620. 785 F.2d at 1199-1200.

621. 28 U.S.C.A. §§1346(b) (West 1976); 28 U.S.C.A. §2672 (West 1965 & Supp. 1989).

622. Where the Court stated:

> Petitioners rely on the word "wrongful" though as showing that something in addition to negligence is covered. This argument . . . does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory.

346 U.S. at 44-45 (emphasis added), citing Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess., 43-44.

623. Praylou v. United States, 208 F.2d 291 (4th Cir. 1953).

624. The judge said that:

> Congress was creating a liability not theretofore existing . . . . To have defined all of the tort rules under which liability could be established would have been almost an impossible undertaking; but standards of liability were necessary and Congress was compelled, as a practical matter, to adopt the principles and standards of local law in defining them.

Id. at 294, quoting Burkhardt v. United States, 165 F.2d 869, 871 (4th Cir. 1947).

625. 208 F.2d at 295 (emphasis added).

626. United States v. Ure, 225 F.2d 709 (9th Cir. 1955).

627. 1 E.R.C. 236, L.R., 3 H.L. 330.

628. The court quoted Dalehite:

> Absolute liability, of course . . . arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act.

225 F.2d at 711 (emphasis by the court), quoting 346 U.S. at 44-45.

629. 406 U.S. 797 (1972).

630. But see, In re Bomb Disaster at Roseville, 438 F.Supp. 769 (E.D.Cal. 1977), where the court questioned whether the Supreme Court had resolved the issue:

> Plaintiffs' claims premised on strict liability in tort are more troublesome. A review of the authorities cited by the parties and the court's own research reveals a paucity of judicial opinion on this question. While Dalehite v. United States, supra, and Laird v. Nelms, supra, provide considerable guidance in resolving this issue, only a handful of cases have discussed, even in passing, the propriety of holding the United States strictly liable in tort under the [FTCA].

438 F.Supp. at 771.

631. Natahley, 351 U.S. at 181.

632. 406 U.S. at 802 (emphasis added).

633. 406 U.S. at 807 (emphasis by the Court), quoting H. R. Rep. No. 1287, 79th Cong., 1st Sess., 3; S. Rep. No. 1400, 79th Cong., 2d Sess., 31.

634. 406 U.S. at 804-05 (emphasis added).

635. Watson v. Alexander, 532 F.Supp. 1004 (E.D.Tex. 1982).

636. Smith v. United States, 621 F.2d 873 (7th Cir. 1979).

637. Id. at 875.

638. 438 F.Supp. at 735.

639. See, e.g., Rosales v. United States, 824 F.2d 799 (9th Cir. 1987), where the court applied the discovery rule to an emotional distress claim.

640. 724 F.2d 104 (10th Cir. 1983).

641. Kohn, 680 F.2d 922.

642. The list includes: assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, and interference with contract rights.

643. 473 U.S. 52 (1985).

644. 465 U.S. 848 (1984).

645. 460 U.S. 289.

646. 788 F.2d 1528 (11th Cir. 1986).

647. Id. at 1532.

648. Id., citing Gross v. United States, 676 F.2d 295, 303-04 (8th Cir. 1982).

649. The court held that Mr. Metz's claim "arose out of" false imprisonment, an excepted tort. Mrs. Metz's claim, predicated on false statements made to gain entry to her home, were also barred because slander is excepted. The court noted that:

> Thus, the Supreme Court has made clear that 28 U.S.C. §2680(h) is to be construed more broadly that the Metzes contend. While the Metzes would have us limit the exemptions of that section to those torts specifically named therein, Shearer, Kosak, and Neal indicate that the phrase "arising out of" is to be given some meaning. The meaning we derive . . . is that a cause of action which is distinct from one of those excepted under §2680(h) will nevertheless be deemed to "arise out of" an excepted cause of action when the underlying governmental conduct which constitutes as excepted cause of action is "essential" to plaintiff's claim.

788 F.2d at 1534.

650. 676 F.2d 295.

651. Id. at 304 (citations omitted).

652. The court stated:

> We also decline the Government's offer to recharacterize Gross' claim so that it falls within the exceptions of section 2680(h). While the Government's actions also may have involved interference with Gross' contract rights, misrepresentation, malicious prosecution, and abuse of process, the [illegible] wrong Gross asserts is their intentional [illegible] of

> emotional distress. . . . Because the [FTCA] does not give immunity for the type of activity . . . here alleged . . . we hold that Gross' claim for damages is not barred by the intentional torts exception.

Id. (footnote omitted) (emphasis added).

653. Crain v. United States, 443 F.Supp. 202 (N.D.Ca. 1977). This court stated that intentional infliction of emotional distress was "not one of the intentional torts explicitly exempted by 28 U.S.C. §2680(h) from the general rule of liability, and the Court must assume in the absence of contrary legislative intent that the lists of exceptions . . . is comprehensive." 443 F.Supp. at 211.

654. Calzarano v. United States Postal Serv., No. 82 Civ. 4904 (WCC) (S.D.N.Y. March 15, 1984) (LEXIS, GENFED library, Dist. file).

655. Ross v. United States, 641 F.Supp. 368 (D.D.C. 1986).

656. Kassel v. United States Veterans Admin., 682 F.Supp. 646 (D.N.H. 1988).

657. Davis v. United States, 667 F.2d 822, 825-26 (9th Cir. 1982); Bois v. Marsh, 801 F.2d 462, 470-71 (D.C.Cir. 1986). For a related situation, see Byrd v. United States, 668 F.Supp. 1529 (M.D.Fla. 1987).

658. See infra pp. 115-17 and Minneman, Future Disease or Condition or Anxiety Relating Thereto, as an Element of Recovery, 50 A.L.R. 4th 13, §§15-17 (Law. Coop. 1988).

659. 28 U.S.C.A. §1346(b) (West 1976).

660. Citations are not provided since such damage awards are so commonplace. The balance of this section focuses, therefore, on some unusual aspects of FTCA awards.

661. 28 U.S.C.A. §2674 (West 1965 & Supp. 1989). As to the former, see, e.g., Carlson v. Green, 446 U.S. 14, 22, (1980), where the Court noted that "punitive damages in an FTCA suit are statutorily prohibited." As to the latter, see, Gross v. United States, 723 F.2d 609, 614 (8th Cir. 1983).

662. 28 U.S.C.A. §2674 (West 1965 & Supp. 1989).

663. See, e.g., Flannery v. United States, 718 F.2d 108 (4th Cir. 1983); United States v. English, 521 F.2d 63 (9th Cir. 1975); DiAmbra v. United States, 481 F.2d 14 (1st Cir. 1973); Harts v. United States, 415 F.2d 259, 264-65 (5th Cir. 1969).

664. 660 F.Supp. 1291 (S.D.N.Y. 1987).

665. Harden v. United States, 688 F.2d 1025 (5th Cir. 1982); Felder v. United States, 543 F.2d 657 (9th Cir. 1976); Harts, 415 F.2d 259. But see, Kalavity v. United States, 584 F.2d 809, 813 (6th Cir. 1979).

666. 660 F.Supp. at 1323.

667. 28 U.S.C.A. §2678 (West 1965 & Supp. 1989).

668. Rufino v. United States, 829 F.2d 354 (2nd Cir. 1987); Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984); Nemmers v. United States, 681 F.Supp. 567 (C.D.Ill. 1988); Burke v. United States, 605 F.Supp. 981 (D.Md. 1985). Cf. Flannery, 718 F.2d 108, though in this case, the plaintiff was comatose and unable to appreciate anything, let alone how his "quality of life" had been impaired.

669. See, e.g., Rufino, 829 F.2d 354.

670. See, e.g., Flannery, 718 F.Supp. 108, and Nemmers, 681 F.Supp. 567.

671. 530 F.Supp. at 644. As discussed, infra, another district court appears to have intended to make precisely such an open-ended award. Clark v. United States, 660 F.Supp. 1164, 1178 (W.D. Wash. 1987). See infra pp. __.

672. Shaw v. United States, 741 F.2d 1202 (9th Cir. 1984).

673. See, e.g., Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986); Robak v. United States, 685 F.2d 471 (7th Cir. 1981).

674. See infra pp. 115-17.

675. See, e.g., Minneman, Future Disease or Condition or Anxiety Relating Thereto, as an Element of Recovery, 50 A.L.R. 4th 13, §§15-17 (Law. Coop. 1988); A. Slagel, Medical Surveillance Damages, A Solution to the Inadequate Compensation of Toxic Tort Victims, Trial, Vol. 24, No. 10, p. 44 (Oct. 1988).

676. 28 U.S.C.A. §2674 (West 1965 & Supp. 1989).

677. 351 U.S. 173.

678. Id. at 182.

679. See, e.g., M. Kornreich, Science and Law in the Toxic Tort Cases, Environmental Claims Journal, Vol 1., No. 2 (Winter 1988/89); J. Bell, Proving Causation, Trial, Vol. 24, No. 10, p. 50 (Oct. 1988); B. Nace, Epidemiological Evidence: Its Uses and Misuses in Toxic Tort Cases, Trial, Vol. 24, No. 10, p. 62 (Oct. 1988); R. Lewis, Animal Data Controversial in Toxic Tort Cases, Water Environment & Technology, Oct. 1989, Vol. 2; A. Roisman, Proving Cause in Toxic-Tort Litigation, The Threshold of a New Era,

Trial, Oct. 1986, p. 59; R. Singer, **Proving Damages in Toxic Torts, Nervous System Dysfunction**, Trial, Nov. 1985.

680. 28 U.S.C.A. §2675(b) (West 1965 & Supp. 1989).

681. Parker v. United States, 611 F.2d at 1013.

682. For instance, the State of Washington had statutes and regulations in effect as early as the 1950s and 60s. See, Clark, 660 F.Supp. at 116[illegible] (Findings of Fact 8, 9).

683. See supra pp. 50-52.

684. Melton v. United States, 488 F.Supp. 1066 (D.D.C. 1980), cited supra pp. 66-67.

685. 620 F.Supp. 374 (E.D.N.Y. 1985).

686. Id. at 379.

687. Case No. 115-88C (Cl.Ct. August 8, 1989) (LEXIS, GENFED library, Cl.Ct. file).

688. 655 F.Supp. 715 (D.D.C. 1987).

689. 42 U.S.C.A. §§7410 (West 1983 & Supp. 1989).

690. 655 F.Supp. at 718, citing Art Metal, 753 F.2d at 1157-59.

691. 655 F.Supp. at 719, citing RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (1965).

692. 655 F.Supp. at 723, quoting Varig Airlines, 467 U.S. at 819-20 (emphasis added).

693. 655 F.Supp. at 724 (emphasis added).

694. 768 F.2d 788 (1985).

695. Id. at 789-90 (emphasis added).

696. Bacon v. United States, 661 F.Supp. 8 (E.D.Mo.), aff'd, 810 F.2d 827 (8th Cir. 1987).

697. Lockett v. United States, 714 F.Supp. 848 (E.D.Mich. 1989).

698. 870 F.2d 790 (1st Cir. 1989).

699. Which were contaminated by asbestos dust from his workplace.

700. 870 F.2d at 801.

701. 847 F.2d 539.

702. Exec. Order No. 10014, 3 C.F.R. §836 (1948); the Navy's 1945 document, Notes on Waste Disposal (prepared by Navy Sanitation Section); the Navy's 1957 Manual on Naval Preventive Medicine (written by Navy Bureau of Medicine and Surgery); and Exec. Order No. 11258, 3 C.F.R. § 357 (1965).

703. Exec. Order. No. 11258, 3 C.F.R. §357 (1965).

704. 870 F.2d 320 (5th Cir. 1989).

705. 33 U.S.C.A. §§1251 et seq. (West 1986 & Supp. 1989).

706. 870 F.2d at 326 (emphasis added). See also, United States v. Mottolo, 629 F.Supp. 56 (D.N.H. 1984), a CERCLA reimbursement action where Mottolo filed a counterclaim alleging that the government had assured him that no action would be brought against him and that, as a result, this assurance was the only reason he allowed the United States to enter the site to remove waste. The district court found these allegations barred by the misrepresentation exception.

707. United States v. Nicolet, Civil Action No. 85-3060 (E.D.Pa. March 20, 1987) (LEXIS, GENFED library, Dist. file) emphasis added).

708. 42 U.S.C.A. §9601(23) (West Supp 1989).

709. 837 F.2d 116 (3rd Cir.), cert. denied, 108 S.Ct. 2902 (1988).

710. 638 F.Supp. 1068, 1084 (M.D.Pa. 1986).

711. 837 F.2d at 122 (footnote omitted) (emphasis added).

712. Id. (footnote omitted) (emphasis added).

713. 656 F.Supp. 1077 (D.N.H. 1987).

714. The fifty count indictment included violations of the CWA, CERCLA, RCRA and TSCA. The plea bargain resulted in guilty pleas for negligent discharge of pollutants into waters of the United States, disposal of hazardous waste without a permit, and failure to notify the appropriate agency of a release of hazardous substances without a permit.

715. National Pollution Discharge Elimination System. See, 33 U.S.C.A. §1342 (West 1986 & Supp. 1989).

716. 656 F.Supp. at 1085.

717. Id. at 1083.

718. 836 F.2d 721 (1988).

719. 683 F.Supp. 120 (E.D.Pa. 1988).

720. 822 F.2d 1322.

721. 861 F.2d 60.

722. 822 F.2d at 1329.

723. 861 F.2d at 62.

724. 685 F.Supp. 1555 (M.D.Fla. 1987).

725. Id. at 1566 (citations omitted) (emphasis added).

726. 875 F.2d 1577 (11th Cir. 1989).

727. 660 F.Supp. 1164.

728. Id. at 1171-72 (Findings of Fact 32, 33) (emphasis added).

729. Id. at 1172 (Finding of Fact 34).

730. Id. (Finding of Fact 36, 37).

731. Id. at 1176-77 (Conclusion of Law 16).

732. Id. at 1177 (Conclusions of Law 21, 22). The latter is curious. The court correctly pointed out that in order for a nuisance theory to apply under the FTCA, plaintiffs must show negligence or a wrongful act. Judge Bryan then decided that since plaintiffs had not proven that the government was negligent, they could not prevail on this theory: "plaintiffs have not shown separately what otherwise amounts to such a wrongful act." Yet the court concluded that the government violated state law and had been "negligent per se." Apparently, the court did not consider statutory violations to be a wrongful act.

733. 660 F.Supp. at 1178 (Conclusion of Law 29) (emphasis added). This conclusion is also curious. It appears to be an attempt to either retain jurisdiction depending upon whether such physical injuries manifest themselves, or to defeat application of res judicata arguments in future claims.

734. Used in a non-CERCLA sense.

735. Finley v. United States, 109 S.Ct. 2003 (1989); Lather v. Beadle Cty., 879 F.2d 365.

736. Johnson, 107 S.Ct. at 2074-75.

737. Id. at 2075 (quoted material restructured for emphasis).

738. S. Rep. No. 836, 81st Cong., 1st Sess., reprinted in 1949 U.S. Code Cong. & Admin. News 2125, 2136, 2143; United States v. Demko, 385 U.S. 149, 151.

739. See supra note 5.

740. 340 U.S. at 143.

741. 346 U.S. at 53-54 (emphasis added).